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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

WILLIAM B. SCHEIDT AND WANDA C. SCHEIDT,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When the Internal Revenue Service determines that a taxpayer owes more tax than is reported on the taxpayer's return, it is authorized to issue a notice of deficiency. If the Internal Revenue Service does not send the notice to the taxpayer's last known address, as in this case, the notice can be valid only if the taxpayer actually receives it. Should this Court resolve the conflict among the eleven United States courts of appeals which have considered the issue and determine if the notice is effective as of the date it is mailed, the date it is received, or the date it is mailed provided that it is received in due course, and further determine when, in such circumstances, the statute of limitations for assessment of the additional tax is tolled or expires?

2. The lower courts have distinguished between notices of deficiency which are mailed once and actually received, as in this case, and those which are returned to the Internal Revenue Service and then remailed and actually received. Have the petitioners been denied due process and equal protection of the law by this distinction, when in substance the amount and type of notice received in each instance is the same?

LIST OF PARTIES

The names of all parties to this litigation appear in the caption of the case.

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners, William B. Scheidt and Wanda C. Scheidt, petitioners below, respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Tenth Circuit (Circuit Judges Tacha, Moore and Engel), which affirmed a judgment below for Respondent, Commissioner of Internal Revenue.

OPINIONS BELOW

The United States Tax Court's memorandum decision is reported as T.C. Memo. 1985-235 and is reprinted in the appendix to this Petition at page 9.

The United States Tax Court's order and memorandum sur order, issued following the petitioners' request for rehearing, has not been reported. It is reprinted in the appendix at page 20. The United States Tax Court's unreported decision is reprinted in the appendix at page 24.

The decision of the Court of Appeals for the Tenth Circuit is reported at 967 F.2d 1448 and is reprinted in the appendix at page 1.

JURISDICTION

The United States Tax Court had original jurisdiction in this action pursuant to 26 U.S.C. §§6212 and 6213.

Appeal from the Tax Court's decision was taken to the Court of Appeals for the Tenth Circuit pursuant to 26 U.S.C. §7482(a)(1), because the petitioners resided within the territorial jurisdiction of that appellate court at the time their petition to the Tax Court was filed.

The judgment of the Court of Appeals for the Tenth Circuit is dated June 18, 1992. The petitioners did not file a petition for rehearing in that Court.

The jurisdiction of this Court to review the decision of the Court of Appeals for the Tenth Circuit is invoked under 28 U.S.C. §§1254(1) and 2101(c).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The provisions involved are lengthy and are set forth in the appendix. The citations to the provisions are as follows:

1. United States Constitution, Amendment V (appendix, p. 26);

2. United States Constitution, Amendment XIV (appendix, p. 26);

3. 26 U.S.C. §6212 (appendix, p. 29);

4. 26 U.S.C. §6213 (appendix, p. 32);

5. 26 U.S.C. §6501 (appendix, p. 38);

6. 26 U.S.C. §6503 (appendix, p. 50);

7. 26 U.S.C. §7482 (appendix, p. 55);

8. Domestic Mail Manual §159.333 (Appendix, p. 59).

STATEMENT OF THE CASE

The material facts are not in dispute, and are set forth in the United States Tax Court's memorandum decision. The ultimate material fact issue was whether the Internal Revenue Service ("IRS") sent the subject notice of deficiency to Petitioners at their "last known address," as that term is used in 26 U.S.C. §6212(b)(1). The Tax Court held that the IRS did not send the notice to Petitioners' last

known address. Respondent did not challenge that finding on appeal, and the Court of Appeals for the Tenth Circuit affirmed the Tax Court's determination.

The legal issue is whether the misaddressed notice was effective when mailed by the IRS or when received by Petitioners. If the misaddressed notice was effective when it was received, then the limitations period within which the IRS could assess additional 1978 income taxes against Petitioners expired before Petitioners received the notice. The Tax Court and the Tenth Circuit held that the misaddressed notice was effective when it was mailed and, therefore, the statute of limitations did not expire.

The decisions of the various United States courts of appeals are in irreconcilable conflict with respect to whether a misaddressed notice of deficiency is valid as of the date it is mailed (as held in five circuits) or as of the date it is received (as held in six circuits). The effective date of the notice is important, because it controls both the time when the statute of limitations for assessment of income tax is considered to be tolled and the time period within which the taxpayer can file a petition in the Tax Court seeking a redetermination of the proposed deficiency. 26 U.S.C. §§6213(a), 6503(a)(1).

After the Tax Court issued its decision, Petitioners paid the alleged 1978 tax deficiency plus interest, in the total amount of approximately $1,500,000.00.

Petitioners timely filed their 1978 federal income tax return on June 15, 1979. (Joint Exh. A-1) On June 9, 1982, the IRS issued a notice of deficiency to Petitioners pertaining to their 1978 federal income taxes, disallowing a deduction relating to investments in a mining program

which Petitioners had claimed in that year. (Exh. "A" to Petition, Doc. 1)

Pursuant to 26 U.S.C. §6501(a) and §6503(a)(1), the statute of limitations for assessment of additional 1978 income taxes against Petitioners expired on June 15, 1982, unless it was tolled by the mailing of the misaddressed notice on June 9, 1982.

Petitioners had rented Post Office Box 20711, Oklahoma City, Oklahoma 73156, but ceased using it on December 31, 1980. (Memorandum decision of the Tax Court, Appendix, pp. 9-19; Doc. 15 in appeal record) In May, 1981, Petitioners notified the IRS of their change of address by providing to the IRS a power of attorney directing that all communications regarding their 1978 federal income taxes be sent to them at their home address, 13108 Green Valley Drive, Oklahoma City, Oklahoma 73120. (Joint Exh. 3-C; Doc. 15 at p.2)

The IRS mailed the notice from an Oklahoma City, Oklahoma, post office to Petitioners at the P.O. Box 20711 address on June 9, 1982. (Joint Exh. 7-G) The Tax Court found that Respondent " . . . ignored the power of attorney or otherwise chose not to send the notice to the Green Valley address" and, therefore, " . . . did not send the notice to petitioners' last known address." (Doc. 15 at p. 9)

The notice arrived at the receiving postal branch office on June 10, 1982. Although postal regulations required that the envelope containing the notice be returned to the Internal Revenue Service after being held for 15 days (Domestic Mail Manual §159.333), the postal

service placed a notice to claim the envelope in Petitioners' post office box, P.O. Box 20748, on July 6, 1982. (Doc. 15 at p. 5)

On that date, Petitioner William B. Scheidt received the claim notice and signed for the envelope containing the notice of deficiency. (Joint Exh. 9-I) The July 6 date of receipt was 27 days after the notice was mailed, and 21 days after the limitations period expiration date.

Petitioners filed a timely petition in the Tax Court seeking a redetermination of the proposed deficiency in their 1978 federal income taxes. (Doc. 1) In their petition, they asserted that the notice of deficiency was invalid and that the statute of limitations for assessing 1978 income taxes against them had expired. They then filed a motion to dismiss for lack of jurisdiction and for summary judgment (Doc. 8).

In the motion, Petitioners asserted that the notice of deficiency either was invalid because it was not effective until they actually received it, at which time the limitations period had expired. Alternatively, they claimed that the IRS had, in effect, remailed the notice to them, based upon the fact that the postal service acted as the IRS's agent in placing the claim notice in P.O. Box 20748, the post office box then being used by Petitioners, instead of returning the envelope to the IRS. In a previous case, *Reddock v. Commissioner*, 72 T.C. 21 (1979), the Tax Court declared invalid a misaddressed notice which was remailed by the IRS and received by the taxpayer after the limitations period expired.

Following an evidentiary hearing, the Tax Court entered its memorandum opinion (Appendix pp. 9-19)

denying Petitioners' motion. The Tax Court held that the notice was effective as of the date it was mailed and it did not matter that Petitioners received the notice after the limitations period expiration date.

Petitioners filed a motion for reconsideration in the Tax Court. (Doc. 17) In their motion, they claimed that they were denied due process and equal protection of the law, because there was no rational basis for distinguishing between a taxpayer who received a misaddressed notice of deficiency mailed once (and, in this case, redirected by the postal service) and a taxpayer who received a misaddressed notice which was remailed. They noted that the taxpayer in *Reddock* had received the remailed notice 17 days after it was first mailed and had filed a timely petition in the Tax Court raising the statute of limitations as a defense. The Tax Court denied Petitioners' request for rehearing and held that they were not denied due process or equal protection of the law. (Order and memorandum sur order, Appendix, pp. 20-23)

After cases of other taxpayers who had invested in the same mining program in which Petitioners had invested in 1978 were decided, the Tax Court entered an order disallowing Petitioners' 1978 deduction on the factual basis of the other decisions. Although Petitioners requested a separate trial to demonstrate their extreme due diligence before investing in the program (Doc. 26), the motion was denied and the program was adjudged to be a fraudulent factual sham as determined in the other decisions. (Doc. 29) The parties submitted an agreed computation (Doc. 31), and the Tax Court entered its decision in favor of Respondent and against Petitioner (Doc. 32).

Petitioners then filed a timely appeal to the Tenth Circuit. In the appeal, they pursued only the issues relating to the validity and effective date of the misaddressed notice of deficiency.

In its decision (Appendix, pp. 1-8), the Tenth Circuit held that the notice was valid as of the date it was mailed. It noted that in rejecting Petitioners' argument, it was agreeing with other circuits that had rejected similar arguments. It did not cite the decisions from other circuits in which a misaddressed notice of deficiency was held to be valid only upon receipt.

The Tenth Circuit also refused to find that a misaddressed notice is invalid if it is not received in the due course of the mail, stating it found no basis for that result in the statutory scheme. The Court also rejected the argument that the postal service's redirecting the envelope containing the notice, as delivery agent for the IRS, constituted a remailing of the notice by the IRS. The Tenth Circuit also held that Petitioners had not been denied due process and equal protection of the law.

If this Court grants certiorari and reverses the Tenth Circuit's decision, it will hold that the misaddressed notice of deficiency was not effective until Petitioners received it, and by that time, the limitations period for assessment of 1978 income taxes against Petitioners had expired. That holding will require the IRS to return to Petitioners the alleged 1978 income tax deficiency plus interest, which Petitioners have paid. Under the so-called "tax benefit rule," Petitioners would be required to report as income in a later tax year that portion of their 1978

mining program deduction represented by a loan, but they would receive a 1978 deduction for their cash invested in the mining program and a substantial refund of interest.

REASONS FOR GRANTING THE WRIT

I. Importance of the Case

The numerous cases involving notices of deficiency reflect that the IRS mails a significant number of deficiency notices to incorrect addresses and many of those notices lead to litigation. The United States courts of appeal have reached an irreconcilable and intolerable conflict in determining whether a misaddressed notice is valid when it is mailed or when it is received. The issue recurs frequently, and this Court should take prompt action to resolve the conflict.

Further, unless this court grants certiorari and resolves the conflict, the manner in which the government treats a taxpayer who receives a misaddressed notice will vary based solely upon where that taxpayer resides. Citizens have the right to expect that the government will administer the federal tax law uniformly and fairly.

Respondent apparently also considers this issue important. In *Powell v. Commissioner*, 958 F.2d 53 (4th Cir. 1992), the Fourth Circuit held that a misaddressed notice of deficiency is not valid until it is actually received

(contrary to the opinion of the Tenth Circuit in this case).[1] On September 10, 1992, Respondent Commissioner filed in this Court a petition for writ of certiorari in *Powell* (which, according to the Clerk's office on September 14, 1992, has not yet been assigned a docket number), claiming that the decision in that case is contrary to the Tenth Circuit's decision in this case.[2]

II. The Effective Date of a Misaddressed Notice of Deficiency

Pursuant to 26 U.S.C. §6212(b)(1), Respondent is "authorized" to send a notice of deficiency to a taxpayer's last known address. The statute does not mention, nor does it contemplate the mailing of a deficiency notice to an incorrect address.

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[1] The Tax Court found that the notice in *Powell* was sent to the taxpayers' last known address. Respondent Commissioner takes the position in his petition for certiorari in *Powell* that the Fourth Circuit did not reverse the Tax Court's decision in that respect. Respondent, therefore, contends that *Powell* is a case in which the Fourth Circuit found that the notice *was* sent to the taxpayers' last known address. Petitioners in this case do not read the Fourth Circuit's decision in *Powell* in that manner. The Fourth Circuit specifically held: "[W]e are of the opinion and hold that the IRS did not exercise reasonable diligence to ascertain the Powells' last know address." 958 F.2d 53, 56.

[2] Respondent's Petition for Writ of Certiorari in *Powell*, p. 14. Respondent contends that the Fourth Circuit's ruling in *Powell* and the Tenth Circuit's judgment in this case are irreconcilable decisions, although for a reason other than that set forth in this Petition. Respondent's contention is based upon his viewing the Fourth Circuit as having found that the notice in *Powell* was sent to the taxpayers' last known address. As stated in fn.1, *supra*, Petitioners in this case do not agree with that view.

The lower courts have consistently held, however, that §6212(b)(1) does not *require* Respondent to mail a deficiency notice to the taxpayer's last known address (i.e. the address at which Respondent reasonably believes the taxpayer desires to be contacted, based upon information available to Respondent). Instead, the "last known address" language creates a safe harbor for Respondent. If he mails a deficiency notice to a taxpayer's last known address, the notice is valid regardless of whether the taxpayer actually receives it. *See, e.g., Guillen v. Barnes,* 819 F.2d 975 (10th Cir. 1987).

The lower courts have also consistently held that if Respondent mails a deficiency notice to an incorrect address, Respondent forfeits the §6212(b)(1) "safe harbor" and the notice is invalid unless it is actually received by the taxpayer.

The United States courts of appeals have taken two diametrically opposed positions in determining the effective date of a misaddressed notice of deficiency which is actually received. Petitioners and Respondent informed the Tenth Circuit of that conflict and called to the Court's attention the Fourth Circuit's decision in *Powell,* which proved to be exactly opposite to the holding in this case.

A. The Five Circuits Holding A Misaddressed Notice Valid When Mailed

The Tenth Circuit held in this case that a misaddressed notice which is actually received is valid as of the date of its mailing for all purposes. Thus, the date of mailing initiates the 90-day period within which the taxpayer can file a petition in the Tax Court, pursuant to 26

U.S.C. §6213(a). The date of mailing also tolls the limitations period for assessment of the tax which is the subject of the notice, pursuant to 26 U.S.C. §6503(a)(1), even if the notice is received after the date on which the limitations period otherwise would have expired.

The First Circuit reached the same conclusion in *Borgman v. Commissioner,* 888 F.2d 916 (1st Cir. 1989), in which the taxpayer received the misaddressed notice five days after it was mailed.

The Third, Ninth and Eleventh Circuits have also held that a misaddressed notice is effective as of the date of its mailing, but as Petitioners read the decisions rendered by those courts, they reach that result only if the notice is received in due course. (*Borgman* could be read in the same way, since in that case the taxpayer received the misaddressed notice through normal mail forwarding.) Petitioners in this case did not receive the misaddressed notice in the due course of the mail.

In *Berger v. Commissioner,* 404 F.2d 688 (3rd Cir. 1968), *cert. den.,* 395 U.S. 905 (1969), the Third Circuit found that the notice of deficiency was sent to the taxpayer's last known address. The Court then stated that even if it could be said that the notice was sent to an incorrect address, it was still effective because the taxpayer actually received it in due course. Interestingly, in this case the Tenth Circuit rejected the "due course" test but cited *Berger* in support of its holding (that a misaddressed notice which is actually received is valid for all purposes as of the date of mailing, regardless of whether it is received in the due course of the mail).

In *Clodfelter v. Commissioner,* 527 F.2d 754 (9th Cir. 1976), *cert. den.,* 425 U.S. 979 (1976), the misaddressed notice was mailed on the last day of the limitations period. It was mailed to a non-existent address, but the receiving postal service substation immediately noticed the error and attempted to deliver the notice to the correct address the very day it was received at the substation. The taxpayers were on vacation, but received the notice upon their return, only nine days after it had been mailed. The Ninth Circuit held that because the notice was actually received " . . . without prejudicial delay (as was clearly the case here), it meets the conditions of §6212(a) no matter to what address the notice successfully was sent." *Id.* at 757.

The Ninth Circuit reached a similar result in *McKay v. Commissioner,* 886 F.2d 1237 (9th Cir. 1989), in which the Court found that the taxpayer received the notice from his attorney within a few days after it was mailed.

In *Wallin v. Commissioner,* 744 F.2d 674 (9th Cir. 1984), however, the Court held the misaddressed notice was valid only when the taxpayer actually received it. The notice had been returned to the IRS, which proceeded to assess the deficiency and then notified the taxpayer about it approximately six months later. The taxpayer filed her petition in the Tax Court within 90 days of her receipt of that notice, and the Ninth Circuit instructed the Tax Court to file the petition as a timely petition. It also held that the IRS's failure to send the notice to the taxpayer's last known address " . . . constituted a violation of statutory notice procedure." *Id.* at 677.

The Eleventh Circuit held in *Pugsley v. Commissioner,* 749 F.2d 691 (11th Cir. 1985), that a misaddressed notice was valid as of the date of its mailing when it was immediately forwarded to the taxpayer at his new address, " . . . where he received the notice in ordinary course." *Id.* at 692.

The Eleventh Circuit subsequently decided *Sicker v. Commissioner,* 815 F.2d 1400 (11th Cir. 1987). There, the misaddressed notice was received by the taxpayer approximately 83 days after it was mailed. The taxpayer's petition to the Tax Court was filed on the 91st day after the notice was mailed. The Tax Court dismissed the case, agreeing with Respondent that the taxpayer had received the notice in time to file a proper petition. The Eleventh Circuit reversed the Tax Court. It held:

> This is not a case such as *Pugsley* where the notice of deficiency was immediately received by the taxpayer. As a matter of law, eight days cannot be considered ample time in which to prepare a petition for redetermination. Congress has determined that 90 days is an appropriate time period in which to prepare such a petition.

Id. at 1401.

Petitioners disagree with the statement of the Tenth Circuit in this case that *Sicker* is entirely consistent with its holding. (Op. of Tenth Circuit Court of Appeals, fn. 5) They contend that the Eleventh Circuit would have held for Petitioners in this case because the misaddressed notice was not delivered in the due course of the mail and, therefore, was effective only as of the date that Mr. Scheidt received it. As the Eleventh Circuit stated in *Sicker,* Congress has determined that 90 days is afforded

to a taxpayer to file a petition in the Tax Court pursuant to 26 U.S.C. §6213(a). In *Sicker*, the Court found that eight days is not sufficient time *as a matter of law.* The 63 days afforded to Petitioners in this case also is not sufficient time as a matter of law.[3]

B. The Six Circuits Holding A Misaddressed Notice Valid Only When Received

The Second, Fourth, Fifth, Sixth, Seventh, and District of Columbia Circuits have all held that a misaddressed notice of deficiency is effective only as of the date it is actually received.

In *Tadros v. Commissioner*, 763 F.2d 89 (2nd Cir. 1985), the Second Circuit found that the notice was sent to the taxpayer's last known address, but if it had not been, the 90-day period within which the taxpayer could have filed

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[3] As noted, the statutes contemplate only a deficiency notice mailed to a correct address. Since the 90-day period begins on the date of mailing (26 U.S.C. §6213(a), Congress intended that a taxpayer have 90 days less the time it takes for a notice to be received in the due course of the mail. There is no reason for finding otherwise with respect to a misaddressed notice. The effect of decisions such as that of the Tenth Circuit in this case is to take a large portion of the 90-day period from the taxpayer and give it to Respondent, a result Congress certainly did not intend. The Eleventh Circuit held that five to eight days is not sufficient time to file a petition, while the Tenth Circuit held in this case that 63 days is sufficient time. Where does one draw the line? The answer, as the Eleventh Circuit stated in *Sicker*, is that Congress has already done so: the time period is 90 days. Due course receipt of a notice would not reduce that period to 63 days.

a petition in the Tax Court would not have begun until the notice was actually received.

The Fourth Circuit recently held in *Powell v. Commissioner, supra,* that the notice of deficiency was not sent to the taxpayers at their last known address and was not sufficient within the meaning of 26 U.S.C. §6212(b)(1). The Court further held:

> When notice of a deficiency is not sent to a taxpayer's last known address, subsequent actual notice of the deficiency will commence the running of the ninety-day period.

958 F.2d 53, 57.

In *Powell,* the petitioners also argued that the limitations period had expired. The Tax Court had not addressed that argument, so the Fourth Circuit remanded the case to the Tax Court to determine the issue.[4] As noted above, Respondent has recently filed in this Court a petition for a writ of certiorari in *Powell.*

The Tenth Circuit erroneously cites *Sorrentino v. Commissioner,* 425 F.2d 213 (5th Cir. 1970), as supporting its holding in this case. The Court in *Sorrentino* found, in effect, that the notice was sent to the taxpayer's last known address; the taxpayer had informed the IRS in writing to send all correspondence to his accountant, and the IRS sent the notice to the accountant.

In *Ward v. Commissioner,* 907 F.2d 517 (5th Cir. 1990), the Fifth Circuit held that a misaddressed notice sent to

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[4] In his Petition for Writ of Certiorari in *Powell* (p. 8, fn.10), Respondent admits that the statute of limitations has expired if, as the Fourth Circuit held, the notice is invalid.

an incorrect address was invalid. Respondent had sent a copy of the notice to the taxpayer at his correct address approximately nine months after mailing the notice to an incorrect address. The petitioner's Tax Court petition was filed more than 90 days thereafter. The Court, in holding the notice invalid, implicitly found that the statute of limitations had expired.

In *Kennedy v. Commissioner,* 403 F. Supp. 619 (W.D. Mich. 1975), *aff'd mem.,* 556 F.2d 581 (6th Cir. 1977), a misaddressed notice of deficiency was considered valid only as of the date the taxpayer actually received it. The Seventh Circuit reached the same result in *McPartlin v. Commissioner,* 653 F.2d 1185 (7th Cir. 1981), remanding the case to the Tax Court for consideration of the statute of limitations issue.

The District of Columbia Circuit held in *Crum v. Commissioner,* 635 F.2d 895 (D.C. Cir. 1980), that the notice of deficiency was not sent to the taxpayer's last known address and the time period for filing the petition for redetermination did not commence until the taxpayer received actual notice of the deficiency. The Court reached the same conclusion in *Diviaio v. Commissioner,* 539 F.2d 231 (D.C. Cir. 1976), holding that the effective date of a deficiency notice is the date of its receipt if Respondent mails it to an incorrect address or chooses to deliver it to the taxpayer by means other than the mail.

C. Discussion

Admittedly, all the United States courts of appeals decisions other than *Sicker, supra,* in which a misaddressed notice of deficiency was held valid as of the date

of receipt, involved notices that were received more than 90 days after they were mailed. Also, in *Sicker*, the notice was received during the 90-day period but the taxpayer's petition to the Tax Court was filed on the 91st day. Those factual differences are not sufficient, however, to explain the conflict among the United States courts of appeals as to whether a misaddressed notice is valid as of the date of mailing or the date of receipt.

Petitioners contend that logically, a misaddressed notice can be valid only when it is received, for until it is received, it is a "dead" notice. As noted, *every* court considering a misaddressed notice has held that it must be received in order to be valid. Thus, it is not the *mailing* of the notice which is important; it is the *receipt* of the notice.

In this case, the Tenth Circuit bases its decision on the fact that 26 U.S.C. §§6212(a), 6213(a) and 6503(a) all refer to the "mailing" of a deficiency notice. It is clear, however, with respect to a misaddressed notice, that the mailing of the notice is irrelevant. The misaddressed notice cannot be effective, regardless of how it is sent or delivered to the taxpayer, unless it is actually received.

The courts must venture outside the statutory language in holding any misaddressed deficiency notice valid. It is both unfair and illogical to revert to the statutory language to find that the notice, if actually received, is valid as of the date it is mailed. That result offends our basic concept of justice, as it permits the government to benefit from its own mistake at the expense of an innocent taxpayer. The result is particularly

offensive where, as in this case, the notice is not received until after the limitation period expired.

Petitioners were prejudiced by Respondent's error in mailing the subject deficiency notice to an incorrect address, not because they had only 63 days of the 90-day period in which to file a petition in the Tax Court, but because the limitations period expired before they received the notice. Until they received the notice, it was legally dead. It became viable for the first time when they received it, and the Tenth Circuit should not have held that the life of the notice related back to the date on which it was mailed.

The tolling of the limitations period under 26 U.S.C. §6503(a)(1) is directly related to the 90-day period provided in 26 U.S.C. §6213(a). Section 6503(a)(1) states the limitations period is tolled, "(after the mailing of a notice under section 6212(a))," during the period in which the Commissioner is prohibited from collecting the determined deficiency. That period is controlled by 26 U.S.C. §6213(a), which is generally 90 days "after the notice of deficiency authorized in section 6212 is mailed."

Therefore, if a misaddressed notice of deficiency is held to be valid only as of the date it is received, at which time the 90-day period provided in §6213(a) begins to run, then the limitations period is not suspended until the date the notice is received.

Even if a misaddressed notice of deficiency is considered valid as of the date of its mailing if it is received in the due course of the mail, the notice sent to Petitioners cannot be considered valid. While the Tax Court found

that the facts surrounding delivery of the notice to Petitioners were not so "far askew" as to constitute a lack of delivery in due course, common sense dictates the opposite conclusion. The postal service has its problems from time to time, but an envelope mailed in one town to another address in the same town certainly should arrive in less than 27 days.

Had Respondent desired to avoid a potential finding of invalidity of the notice sent to Petitioners, he *easily* could have sent the notice to the Petitioners at their correct address.[5] He did not do so, and he should bear the consequences of his mistake. Petitioners are entirely innocent. They should not be penalized.

Petitioners believe it is especially egregious that the Tenth Circuit determined, as did the Tax Court, that Respondent's error was rendered "harmless" by the Petitioners' timely filing their petition in the Tax Court. The result: Petitioners are disqualified to receive relief from government error *because* they filed a petition requesting such relief. The Tax Court refused to condone that result in *Reddock, supra,* and in the interests of equity, fairness and justice, both the Tax Court and the Tenth Circuit should have refused to condone that result in this case.

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[5] Interestingly, in his Petition for Writ of Certiorari in *Powell* (p. 12, fn.13), Respondent admits that the IRS often sends notices of deficiency close to the end of the limitations period, and if a taxpayer later questions the notice, it is too late for the IRS to correct an error. That makes it even more imperative that the IRS exercise diligence to insure that a notice of deficiency is sent to a taxpayer's last known address. In this case, the address appeared in the IRS's audit file, but the IRS chose to ignore it.

In *Reddock, supra,* the IRS mailed a notice of deficiency to an incorrect address shortly before the limitations period was due to expire. The notice was returned to the IRS, which remailed it to the correct address shortly after the expiration date of the limitations period. The taxpayers received the notice 17 days after its first mailing and filed a timely petition in the Tax Court, raising the statute of limitations as a defense. The Tax Court held that the notice was invalid and the limitations period had expired.

As in this case, Respondent claimed that the taxpayer had "waived" any objection to the misaddressed notice by filing a timely petition and that the defect was merely "technical." The Tax Court held in *Reddock*:

> We are not dealing here with a technical defect. We are dealing with the statute of limitations on assessments which goes to the heart of the Commissioner's power to determine and assess deficiencies. . . . By filing their petition in this Court, petitioners waived nothing.

72 T.C. 21, 27.

The Court should grant this petition and resolve the conflict among the United States courts of appeals by holding that a misaddressed notice of deficiency is valid only as of the date it is actually received. The proper development of federal tax law requires that the conflict be resolved, and the law will suffer if the conflict is allowed to continue.

III. Due Process and Equal Protection

Petitioners have been denied due process and equal protection of the law, under Amendments V and XIV of

the United States Constitution, by the Tenth Circuit's distinguishing them from taxpayers who received misaddressed notices of deficiency after the time the limitations period for assessment of tax was due to expire, where the notices were mailed twice rather than once.

As noted above, the Tax Court held in *Reddock, supra,* that the deficiency notice remailed by the IRS and received by the taxpayer after the limitations period expiration date was invalid. The Court distinguished *Clodfelter, supra,* and similar cases, because in those cases, there was no delay in receipt of the misaddressed notice. The Tax Court reached the same result under similar facts in *Weber v. Commissioner,* T.C. Memo. 1983-610, holding that actual notice was not received prior to the expiration of the statute of limitations. The taxpayers had received the notice within 21 days after the date of its first mailing.

There is no rational basis for distinguishing Petitioners in this case from the taxpayers in *Reddock* and *Weber.* The Tenth Circuit held that the distinction was reasonable because 26 U.S.C. §6503(a)(1) provides for tolling of the limitations period as of the date a deficiency notice is mailed. The flaw in the Tenth Circuit's reasoning is, as stated above, that with respect to a misaddressed notice of deficiency, it is the date of receipt which matters, not the date of mailing.

The Tenth Circuit also found that the date of mailing should control because it is more easily verified than the date of receipt. It is not Petitioners' fault that the IRS sent the notice to an incorrect address. It is inherently unfair to find that the date of mailing controls, to the benefit of

Respondent, simply because that date is easier to determine than the date of receipt. Also, in many cases, such as this one, the date of receipt is easily determined.

In holding that a misaddressed notice is effective if it is actually received, the courts have constantly stated that receipt of the notice satisfies the "purpose" of the statutes (26 U.S.C. §§6212 and 6213). They are, therefore, looking to the substance of the notice. In substance, the facts in this case, *Reddock* and *Weber* are the same. In all three cases, the misaddressed notice was not received until after the limitations period expired.

The purpose of the statutes has been served equally well in both situations. In both situations the notice should be held to be effective only as of the date of its receipt.

CONCLUSION

The tax laws addressed in this Petition should be applied uniformly. The conflict among the United States courts of appeals prevents a uniform application. This Court should resolve that conflict.

Dated this 16th day of September, 1992.

Respectfully submitted,

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APPENDIX

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

WILLIAM B. SCHEIDT and WANDA C. SCHEIDT,	)	
Petitioners-Appellants,	)	No. 91-9008
v.	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent-Appellee.	)	

APPEAL FROM THE UNITED STATES TAX COURT
(T.C. No. 22537-82)
(Filed June 18 1992)

Michael W. Thom, of Thom & Hendrick, Oklahoma City, Oklahoma, for the Petitioners-Appellants.

Gilbert S. Rothenberg (Shirley D. Peterson, Assistant Attorney General; and Gary R. Allen and Regina S. Moriarty, Attorneys, Tax Division, Department of Justice, Washington, D.C., with him on the brief), Attorney, Tax Division, Department of Justice Washington, D.C., for the Respondent-Appellee.

Before MOORE, ENGEL,* and TACHA, Circuit Judges.

TACHA, Circuit Judge.

Appellants William and Wanda Scheidt appeal from an order of the United States Tax Court denying both their motion to dismiss for lack of jurisdiction and their motion for summary judgment. On appeal, appellants contend that the Commissioner's misaddressed notice of deficiency to appellants failed to toll the three-year limitation period before which the Commissioner must assess tax deficiencies. We exercise jurisdiction under 26 U.S.C. § 7482(a) and affirm.

BACKGROUND

On June 15, 1979, appellants filed a joint federal income tax return for 1978. On June 9, 1982 – six days before expiration of the three-year statutory limitations period – the Commissioner mailed, by certified mail, a notice of deficiency to appellants. The notice was addressed, Post Office Box 20711, Oklahoma City, OK 73156. However, during 1981, appellants relinquished that post office box and began renting Post Office Box

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* The Honorable Albert J. Engel, Circuit Judge for the United States Court of Appeals for the Sixth Circuit, sitting by designation.

20748. Further, their forwarding order from Box 20711 to Box 20748 expired on December 31, 1981 and, thus, was not in effect when the Commissioner sent the notice of deficiency. The record indicates, and the Tax Court found, that appellants had previously directed the Internal Revenue Service during 1981 to send all notices and other correspondence to 13108 Green Valley Drive, Oklahoma City, OK, with copies to their accountant, Robert J. Drewell, 2405 N.W. Expressway, Suite 200, Oklahoma City, OK.

The deficiency notice mailed by the Commissioner on June 9, 1982 informed appellants of tax deficiencies for their 1978 and 1979 returns. The record reveals that, on or about June 10, 1982, the Village Branch Post Office received a certified letter addressed to appellants at Post Office Box 20711. The Post Office placed a notice in Box 20711 indicating that appellants should pick up a certified letter. Apparently, the letter was never returned to the Commissioner. According to the Tax Court, "[t]he next verifiable event is that on July 6, 1982, a certified letter bearing number 02364642054 appeared in [appellants'] Post Office Box 20748." *Scheidt v. Commissioner*, 49 T.C.M. (CCH) ¶1501 (1985). Appellant William Scheidt subsequently received and signed for delivery of the deficiency notice mailed on June 9, 1982.

Appellants filed a timely petition for redetermination in the Tax Court regarding only their 1978 return. The Tax Court made several ultimate findings of fact, which neither party contests on appeal and which we find are not clearly erroneous: first, the Commissioner did not mail the notice of deficiency to appellants' last known

address;[1] second, the Commissioner mailed the notice on June 9, 1982, prior to expiration of the three-year assessment limitation period; third, the Commissioner never actually remailed the notice of deficiency; and fourth, appellants received the notice in time to file a petition for redetermination and did in fact file a timely petition in the Tax Court. The Tax Court then held that the June 9, 1982 mailing of the notice of deficiency tolled the three-year statutory period because it was timely mailed by the Commissioner and provided actual notice of the deficiency to appellants with ample time remaining before the deadline for filing a petition for redetermination.

DISCUSSION

The Commissioner must make an assessment of taxes within three years after a taxpayer files a return. 26 U.S.C. § 6501.[2] If upon assessment the Commissioner determines that a deficiency exits, he must give notice

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[1] Pursuant to 26 U.S.C. § 6212(b)(1), a notice of deficiency "shall be sufficient" if mailed to the taxpayer at his or her "last known address." This subsection creates a safe harbor for the Internal Revenue Service by allowing it to toll § 6213's three-year limitations period by sending the notice to the taxpayer's last known address, even if the taxpayer never actually receives the notice of deficiency. In this case, the Tax Court found that the Commissioner did not mail a notice of deficiency to taxpayers' last known address, and the Commissioner has not appealed from this finding. Therefore, for purposes of this appeal, the safe harbor provided by § 6212(b)(1) is not available.

[2] Section 6501(a) provides that, "[e]xcept as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed."

before initiating collection proceedings. *Id.* § 6213(a).[3] Section 6212(a) authorizes the Commissioner, when there is a deficiency, "to send notice of such deficiency to the taxpayer by certified mail or registered mail." Within ninety days after the Commissioner mails the notice of deficiency, the taxpayer may petition the Tax Court for redetermination of the deficiency. *Id.* § 6213(a). The Commissioner may not make or bring any assessment, levy or court proceeding during the running of the 90-day period or, if the taxpayer files a petition for redetermination, until after the Tax Court renders a final decision. *Id.* Further, section 6503(a) tolls the running of the three-year limitations period for assessment from the time the Commissioner mails the notice of deficiency until sixty days after the period during which the Commissioner is prohibited from making an assessment.[4]

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[3] Section 6213(a) provides,

> [w]ithin 90 days . . . after the notice of deficiency authorized in section 6212 is mailed . . . , the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. . . . [N]o assessment of a deficiency . . . shall be made . . . until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day . . . period . . . , nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final.

[4] Section 6503(a)(1) provides that

> [t]he running of the period of limitations provided in section 6501 . . . shall (after the mailing of a notice under section 6212(a)) be suspended for the period during which the Secretary is prohibited from making the assessment . . . and for 60 days thereafter.

As their primary contention, appellants argue that the deficiency notice was invalid and failed to toll the statutory period for assessment because the Commissioner misaddressed the notice and because appellants did not receive the notice until twenty-one days after the limitations period expired. We agree with other circuits that have rejected similar arguments. The statutory scheme for tax assessments contemplates that "[a] notice of deficiency that is actually received without delay prejudicial to the taxpayer's ability to petition the Tax Court is sufficient to toll the statute of limitations as of the date of mailing." *Borgman v. Commissioner,* 888 F.2d 916, 918 (1st Cir. 1989); *see also McKay v. Commissioner,* 886 F.2d 1237, 1239 (9th Cir. 1989) (" '[I]f mailing results in actual notice without prejudicial delay . . . it meets the conditions of § 6212(a) no matter to what address the notice successfully was sent.' ") (quoting *Clodfelter v. Commissioner,* 527 F.2d 754, 757 (9th Cir. 1975), *cert. denied,* 425 U.S. 979, 96 S.Ct. 2184, 48 L.Ed.2d 805 (1976)); *Pugsley v. Commissioner,* 749 F.2d 691, 692-93 (11th Cir. 1985);[5]

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[5] Appellants cite *Sicker v. Commissioner,* 815 F.2d 1400 (11th Cir. 1987), to support their argument that a notice is invalid if the taxpayer is not afforded the full ninety days (less time for mailing in "due course") to file a petition for redetermination. However, we conclude that *Sicker* is entirely consistent with our holding today. In *Sicker,* the taxpayer learned of a deficiency notice 87 days after the Commissioner mailed it to an incorrect address. The Eleventh Circuit found that, at most, the taxpayer had only eight days to prepare and file a petition for redetermination and held that "[a]s a matter of law, eight days cannot be considered ample time in which to prepare a petition for redetermination." *Id.* at 1401. In this case, the Tax Court found, and appellants do not contest, that appellants were not prejudiced by having only 63 days to prepare and file a petition in the Tax court.

Sorrentino v. Ross, 425 F.2d 213, 215 (5th Cir. 1970); *Berger v. Commissioner*, 404 F.2d 668, 672-74 (3d Cir. 1968); *cert. denied*, 395 U.S. 905, 89 S.Ct. 1744, 23 L.Ed.2d 218 (1969). Appellants received their notice of deficiency sixty-three days before they were required to file a petition for redetermination in the Tax Court. The Tax Court found that appellants were not prejudiced by having only sixty-three days to file the petition. Appellants do not contest this finding on appeal. Therefore, we hold that appellants were adequately notified by the notice of deficiency mailed on June 9, 1982 and that the limitations period was tolled as of that date pursuant to § 6503(a)(1).

Appellants urge us to adopt a rule that a notice of deficiency is not valid under § 6212 unless the notice is mailed prior to expiration of the three-year limitations period and is received by the taxpayer in "the due course of the mail." Appellants argue that because the Commissioner incorrectly addressed the notice of deficiency and because they did not receive the notice for twenty-seven days, they did not receive the notice in the due course of the mails and it thus did not toll the limitations period. We can find no basis in the statutory scheme for the test or the rule urged by appellants. Section 6213(a) clearly provides for a tolling of the limitations period when the Commissioner *mails* the deficiency notice. Absent any evidence of Congressional intent, we decline to graft an additional prerequisite to the tolling of the limitations period based on whether a taxpayer *receives* the notice of deficiency in the due course of the mails.

Appellants also assert that because the notice was sent by certified mail, it should have been returned to the Internal Revenue Service after a time period specified by United States Postal Service regulations. Appellants

argue that the failure to return the notice of deficiency to its sender, rendered the Postal Service's act of placing the notice in appellant's post office box a remailing – after expiration of the limitations period – by the Commissioner. We also must reject this theory of remailing. The record indicates that the Commissioner actually mailed the notice of deficiency only one time and that appellants received the letter in sufficient time to file a timely petition for redetermination. The Commissioner simply never remailed the notice. Therefore, we hold that the June 9, 1982 mailing tolled the limitations period pursuant to § 6213(a).

We also conclude that appellants' equal protection argument lacks merit. Appellants contend that the Tax Court's decision draws an irrational distinction between taxpayers, like themselves, who receive a misaddressed notice of deficiency that is not returned (and thus tolls the limitations period) and taxpayers who do not receive a misaddressed notice of deficiency because the Postal Service returns it to the Commissioner after the limitations period has expired. We conclude, however, that the distinction drawn is reasonable.

Congress' decision to toll the limitations period as of the time the Commissioner sends a notice, as opposed to when the taxpayer becomes aware of the notice, is reasonable because the date on which the Commissioner's notice is postmarked is more easily verified. Given Congress' decision that the date of *mailing* tolls the limitations period, a clearly rational distinction exists between those taxpayers that receive a notice mailed before the three-year period expires and those who do not.

AFFIRMED.

ATTACHMENT "A"

T. C. Memo. 1985-235

UNITED STATES TAX COURT

WILLIAM B. SCHEIDT AND WANDA C. SCHEIDT, Petitioners v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 22537-82 Filed May 15, 1985.

Michael W. Thom, for the petitioners.

Juandell D. Glass, for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

CLAPP, Judge: This case is before the Court on petitioners' Motion to Dismiss for Lack of Jurisdiction and Motion for Summary Judgment. Petitioners argue that the notice of deficiency for 1978 is invalid on two grounds: (1) the deficiency notice was not sent to petitioners' last known address within the meaning of section 6212(b)(1) and (2) the deficiency notice was "remailed" by respondent after the expiration of the period of assessment as defined by section 6501, or if not "remailed" by respondent, it was not received in "due course."

FINDINGS OF FACT

Petitioners filed a joint Federal income tax return for 1978 on June 15, 1979. On June 9, 1982, respondent mailed to petitioners a notice of deficiency which was received by them on July 6, 1982.

Their address shown on the 1978 return was 3737 Dow Drive, Oklahoma City, Oklahoma 73116. Petitioners'

1979 return was filed bearing the address Post Office Box 20711, Oklahoma City, Oklahoma 73156. On or about December 31, 1980, petitioners relinquished Box 20711 and began renting Box 20748. Box 20711 was then rented by petitioners' accountant Robert J. Drewell. Petitioners' postal forwarding order from Box 20711 to Box 20748 expired on December 31, 1981.

On May 19, 1981, petitioners executed a Power of Attorney, Form 2848, pertaining to their 1978 and 1979 Federal income tax returns, directing the Internal Revenue Service to send notices and other written communications to petitioners at 13108 Green Valley Drive, Oklahoma City, and with copies to Robert J. Drewell, 2405 N.W. Expressway, Suite 200, Oklahoma City, Oklahoma.

William Scheidt and Robert Drewell began sharing office space in May 1980 at 2405 N.W. Expressway, Suite 200, Oklahoma City, Oklahoma. Mr. Scheidt would occasionally receive from Mr. Drewell mail which had improperly been placed in Mr. Drewell's post office box.

On or about April 30, 1982, respondent mailed a letter to petitioners relating to their income tax liabilities for 1978 and 1979. That letter was addressed to Box 20711. Petitioner William Scheidt did not receive the original, but he received a copy of it from Robert Drewell. No communications took place between respondent and petitioner with regard to this letter.

During this time period respondent's audit file for petitioners contained several documents, worksheets, etc., with differing addresses: The 1979 return bore the Post Office Box 20711 address. The "15-day" letter bore

the same address. There was, however, nothing to indicate that petitioners received that letter. The power of attorney, dated prior to the "15-day" letter in the audit file, indicated petitioners' address for correspondence as 13108 Green Valley Drive. Respondent's examination work papers, on the first page thereof, contained a struck through Post Office Box 20711 address. Above the stricken address, the Green Valley address was written. The second page of the examination sheets showed only the Green Valley address. Also within respondent's audit file was a form 4564, Information Document Request, bearing petitioners' Green Valley address.

In mid May 1982, respondent sought to obtain petitioners' "last known address" by contacting their Austin Service Center and conducting a computer search. The computer search yielded only Box 20711 as petitioners' address. Thus on June 9, 1982, six days prior to the last day for assessment of petitioners' 1978 income tax liability, respondent by way of certified mail bearing number 02364642054 sent petitioners a notice of deficiency regarding their tax liabilities for 1978 and 1979. (Only the year 1978 is at issue in this case.) The certified letter was addressed to William and Wanda Scheidt, but at the Post Office Box 20711 address.

Respondent did not send a duplicate original to Box 20748 which was currently being rented by petitioners. Nor did respondent send a duplicate original to petitioners at their Green Valley address which was noted on their Power of Attorney valid for 1978 and 1979. Nor did respondent send a duplicate original or even a copy to Mr. Drewell in whose favor the power of attorney was

executed. Rather, respondent sent the one and only notice to petitioners at the Post Office Box 20711 address.

On or about June 10, 1982, the Village Branch Post Office received a certified letter addressed to petitioners at Post Office Box 20711. The post office left a notice in Post Office Box 20711 indicating that a certified letter for the Scheidts was waiting to be picked up. Usually the post office leaves three notices to the patron, and if it is still unclaimed on the 15th day after it has been placed in the post office box, it is returned to the sender. Here, a delivery reminder had stamped on it "Final Notice" and the date of return written on it was June 25, 1982. The record does not indicate that the letter was returned to the sender. Mrs. Williams, the post office clerk in charge of handling certified mail, testified she had been on vacation in the early part of June, and it was possible that her work had piled up, thus not enabling her to handle the returns on precisely the 15th day, which occasionally happened.

The next verifiable event is that on July 6, 1982, a certified letter bearing number 02364642054 appeared in petitioners' Post Office Box 20748. On July 6, 1982, William Scheidt signed for and received delivery of a deficiency notice for 1978 and 1979. Petitioners filed a timely petition bearing Post Office mark dated September 4, 1982, in the Tax Court, with regard to the determined deficiency for the year 1978 only.

ULTIMATE FINDINGS OF FACT

Petitioners' last known address was not the Post Office Box 20711 address. Respondent did not mail the notice of deficiency to petitioners' last known address.

Respondent did mail the notice on June 9, 1982, prior to the expiration of the period of assessment. Respondent did not "remail" the notice at any time thereafter. Petitioner received the notice in sufficient time to file a timely petition, and in fact filed a timely petition. Petitioners were not prejudiced by any delay in receipt.

OPINION

Respondent contends that Box 20711 was a valid address for petitioners when the notice of deficiency was sent to them. Respondent argues further that if Green Valley was petitioners' street address, then Post Office Box 20711 was an additional valid address. Conversely, petitioners argue that Box 20711 was not at the time of the mailing of the notice of deficiency a valid address, and certainly not their "last known address." Petitioners left a confusing trail to follow; however, respondent in our opinion has not shown due diligence in tracking down petitioners' last known address and/or addresses which were clearly in his files. We therefore agree with petitioners and so find that Post Office Box 20711 was not petitioners' last known address.

During the period from June 25, 1982, to July 6, 1982, it is unclear what happened to the certified letter. According to United States Postal regulations, a certified letter is held 15 days, and if after the 15th day it is unclaimed, it

then is returned to the sender. In this case, the postal clerk directly involved with the certified letters at the Village Branch does not know and could not testify with certitude whether that procedure was in fact followed. Petitioners argue that the certified letter was returned to respondent and respondent merely dropped it back into the mails for delivery after the period of assessment had expired.

Respondent contends that there was one, and only one mailing of the notice on June 9, 1982, and it was eventually received by petitioners without any detriment to them. Respondent argues that the first and only mailing of the notice was prior to the expiration of the period for assessment.

It is petitioners' burden to prove that the notice of deficiency was mailed after the expiration of the period of assessment. When a certified letter is returned to its sender, a notation on the record accounting for certified letters (which in this case was kept at the main branch) would indicate such disposition. No offer of proof with regard to this record was submitted at the hearing on this motion. We are not convinced by the testimony of petitioners' witnesses, and proposed scenario in petitioners' brief that the notice was in fact remailed to Box 20711 after June 15, 1982, and thus, after the expiration of the period for assessment. Since petitioners were unpersuasive on this point, we hold that the notice of deficiency was timely mailed by respondent.

Section 6212(a) authorizes the Secretary to send a notice of deficiency "to the taxpayer by certified mail or registered mail." Pursuant to section 6212(b)(1), it shall be

sufficient if the notice of deficiency is mailed to the taxpayer at his last known address. Neither section 6212, nor the regulations promulgated thereunder define what constitutes a taxpayer's last known address. It has been defined as the address to which in light of all the facts and circumstances, respondent reasonably believed the taxpayer wished the notice of deficiency to be sent. In determining whether respondent has mailed a notice to the taxpayer's last known address, the inquiry thus pertains to respondent's knowledge obtained through reasonable diligence rather than to what in fact may be the taxpayer's most current address. *Frieling v. Commissioner*, 81 T.C. 42 (1983).

In *Frieling*, the Court stated:

> Absent "clear and concise notification" from the taxpayer directing respondent to use a different address, respondent is entitled to treat the address shown on the return for which the notice of deficiency is being issued as taxpayer's "last known address." However, once respondent becomes aware of a change in address, he must exercise reasonable care and diligence in ascertaining and mailing the notice to the correct address. Whether respondent has properly discharged this obligation is a question of fact. [81 T.C. at 49]

In the instant case, petitioners' address on their 1979 return was Post Office Box 20711; the address to which the deficiency notice was sent. However, petitioners clearly and concisely notified respondent that all communication with regard to their 1978 and 1979 income tax liabilities were to be sent to the Green Valley address. The power of attorney that petitioners executed is considered

to provide respondent with clear notice of their last known address. See *Expanding Envelope & Folder Corporation v. Shotz*, 385 F.2d 402, 404 (3rd Cir. 1967). Thus, respondent had in fact received clear and concise notification prior to the issuance of the deficiency notice that petitioners' last known address was Green Valley Drive, not Post Office Box 20711. Nevertheless, respondent ignored the power of attorney or otherwise chose not to send the notice to the Green Valley address. We, therefore, find that respondent did not send the notice to petitioners' last known address.

Even though respondent did not send the deficiency notice to petitioners' last known address, it is nonetheless valid. See *Frieling v. Commissioner, supra* at 53; *Mulvania v. Commissioner*, 81 T.C. 65 (1983). Providing the taxpayer with the actual notice of the deficiency in a timely manner is the essence of the statutory scheme. *Clodfelter v. Commissioner*, 527 F.2d 754, 756 (9th Cir. 1975), affg. 57 T.C. 102 (1971). In circumstances "where the notice is sent to the wrong address and *never delivered*, the statutory purpose is not served * * * [however], where the notice is sent to the wrong address *but delivered to the taxpayer in due course*, there is no prejudice to the taxpayer and the notice is valid." [Emphasis supplied.] *Zikria v. Williams*, 535 F. Supp. 481, 485 (W.D. Pa. 1982).

Respondent in this case mailed the notice six days prior to the expiration of the period of assessment. Petitioners received the notice with 63 days left to file a timely petition with this Court. On September 4, 1982, petitioners did in fact submit a timely petition. We cannot see how, if in any way, petitioners were prejudiced by the

notice being improperly addressed. Following the dictates of the *Frieling* opinion, since the notice was timely mailed by the Commissioner and was received without prejudicial delay by petitioners in compliance with section 6212(a), the notice is effective for all purposes from the time of its mailing.

As long as the notice complies with section 6212(a), 6503(a)(1) literally provides that the mailing of that notice tolled the period of limitations on the date it was mailed. *Frieling v. Commissioner, supra* at 57.

Despite the opinion in *Frieling v. Commissioner,* petitioners still maintain that they are entitled to summary judgment for two reasons. Firstly, petitioners argue that the notice was remailed by respondent after the period of assessment had expired. If in fact the post office had sent the undeliverable certified letter (the notice) back to respondent and respondent then remailed it after the period of limitations had run, there would be no deficiency due from petitioners. *Reddock v. Commissioner,* 72 T.C. 21 (1979).

Respondent does not purport to know exactly what happened to certified letter #02364642054 from June 25, to July 6, 1982. Respondent has shown that the certified letter bearing #02364642054 was mailed to petitioners at Post Office Box 20711 on June 9, 1982, six days prior to the expiration of the period of assessment and received in Post Office Box 20478 by petitioners on July 6, 1982. Petitioners have not proven that the notice was remailed after the three-year limitations period prescribed by section 6501(a) had expired. Absent such proof, the holding of *Frieling* is controlling on these facts.

Petitioners' second argument is that even if the notice was not sent back to respondent and not remailed after the expiration of the period of limitations, the notice was nevertheless invalid according to *Frieling*. The Court held in *Frieling v. Commissioner, supra* at 60-61:

> In summary we hold that the notice of deficiency mailed to petitioners was valid even though it was not sent to their last known address. The notice complied with section 6212(a) because petitioners received it in due course through the Postal Service and filed a timely petition in this Court.

Petitioners contend that in order for a misaddressed deficiency notice to be valid, *Frieling's* holding requires a two-prong criteria to be met: (1) petitioners must receive the notice in "due course" through the Postal Service, and (2) must file a timely petition in this Court. they argue that the notice was not received in "due course," and is therefore invalid according to *Frieling*.

We do not read the *Frieling* opinion as requiring a two-step test to be met before section 6212(a) is satisfied and section 6501(a) applies to toll the period of limitations. *Frieling* requires that in order for a notice which is not sent to petitioners' last known address to be valid, petitioners must not be prejudiced by the misaddressing, and must be able to timely file a petition with the Tax Court.

Even if we did read *Frieling* to require the notice to be received in "due course," which we do not, the facts herein are not so far askew from "due course" as to invalidate the notice of deficiency. Mrs. Williams testified that her work occasionally piled up causing the returning

of the unclaimed certified letters to be delayed beyond the usual 15-day period. It is quite possible that she was behind in returning unclaimed certifieds in June 1982, because she testified she had been on vacation in the early part of that month. Additionally, the 6th of July in 1982 was a Tuesday. It was the first working day after a long weekend surrounding a holiday. Thus, the last working day was Friday, July 2, 1982, which was exactly one week after the June 25, 1982, return date.

Considering the aforementioned, the delay in receipt was not outrageous; and the treatment and ultimate receipt of the notice of deficiency would qualify as within "due course" —— *if* that were the test.

The significant factor in the *Frieling* case, as in the instant case, is that petitioners eventually received the notice and were afforded ample opportunity to file a petition; and in both cases, timely petitions were in fact filed.

Pursuant to section 6501(a)(1), the mailing of the notice to petitioners under section 6212(a) tolled the period of limitations on the date (June 9, 1982) that it was mailed.

Accordingly, petitioners' Motion to Dismiss for Lack of Jurisdiction and petitioners' Motion for Summary Judgment are denied. To reflect the foregoing, *an appropriate order will be issued.*

ATTACHMENT "B"

UNITED STATES TAX COURT
Washington, D.C. 20217

WILLIAM B. SCHEIDT AND WANDA C. SCHEIDT, Petitioners, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	)	Docket No. 22537-82

ORDER AND MEMORANDUM SUR ORDER

On June 14, 1985 petitioners filed a motion for reconsideration of opinion of the above-referenced case pursuant to Rule 161 of the Tax Court Rules of Practice and Procedure. This motion is filed in response to the Court's Memorandum Opinion, dated May 15, 1985, that denied petitioners' Motion to Dismiss for Lack of Jurisdiction and Motion for Summary Judgment.

The Court determined that the statutory notice of deficiency was not mailed to petitioners' last known address in accordance with section 6212(b)(1), I.R.C. 1954, as amended, which petitioners do not dispute. However, petitioners disagree with the Court's finding that a valid notice of deficiency was issued pursuant to section 6212(a). We agree with the Court's conclusions and deny petitioners' motion.

Petitioners first argue that the deficiency notice must be mailed to a taxpayer's last known address to satisfy

the statutory notice requirements. They rely on the dissenting opinion in *Frieling v. Commissioner*, 81 T.C. 42, 63 (1983), which argues for a strict rule that "an improperly addressed statutory notice has in effect not been 'mailed to the taxpayer.' " Section 6212(a) authorizes sending a notice of deficiency by certified or registered mail. The prevailing position in *Frieling v. Commissioner, supra* at 51-53, as in other cases (e.g., *Mulvania v. Commissioner*, 81 T.C. 65, 67-68 (1983), on appeal (9th Cir. October 31, 1983)), is that section 6212(b) provides that a taxpayer's last known address is sufficient for this purpose, but is not mandatory. The mailing of a deficiency notice to a taxpayer provides notice of the proposed deficiency assessment and collection, and the opportunity to petition the Tax Court for its prepayment redetermination. *Frieling v. Commissioner, supra* at 53; *Mulvania v. Commissioner, supra* at 67. Inasmuch as petitioners here did receive the notice with ample time to petition for its review and in fact filed a timely petition with the Tax Court, the notice satisfied its intended purposes. We agree that a valid notice of deficiency was mailed to petitioners. *Frieling v. Commissioner, supra* at 53; *Mulvania v. Commissioner, supra* at 68-69; *Goodman v. Commissioner*, 71 T.C. 974, 977-979 (1979). Therefore we conclude that the Court correctly denied petitioners' Motion to Dismiss for Lack of Jurisdiction.

In the second issue raised at trial petitioners argued they did not receive the notice of deficiency until after the 3-year statute of limitations for assessment had run. However, the notice here has been deemed to be sufficient and as such is valid as of its date of mailing not

merely upon petitioners' receipt and is valid for all purposes. *Frieling v. Commissioner, supra* at 57. Consequently, the statute of limitations was tolled as of the date of mailing. "Section 6503(a)(1) expressly provides that the event that suspends the period of limitations under section 6501 is 'the mailing of a notice under 6212(a).' " (Fn. omitted; Id. at 55.) Therefore, we conclude that, since petitioners' receipt of the notice was not beyond the running of the period of assessment, the Court correctly denied petitioners' Motion for Summary Judgment.

Finally, petitioners pose several additional arguments which we reject because they obscure the real issue here; that is, whether the notice of deficiency was valid ab initio. They argue, in the alternative, that the notice was remailed untimely, that respondent must prove it was not remailed, and in any event that it is discriminatory to distinguish between taxpayers based on the remailing of a deficiency notice. Given that petitioners received a single notice of deficiency which satisfied the requisite statutory objectives as of its mailing, we need not consider these arguments. Also, petitioners contend the notice is invalid because its receipt was delayed by postal employees' willful violation of established regulations, who, as agents of the Government, acted on behalf of respondent. As stated above, the validity of the notice has been determined as of the date of mailing and not as to its actual receipt; petitioners have failed to establish any deprivation of their constitutional rights based on the delay in their receipt of the notice.

Based on the foregoing it is hereby

ORDERED that petitioners' motion for reconsideration is denied.

/s/ Samuel B. Sterrett
Samuel B. Sterrett
Chief Judge

Dated: Washington, D. C.
July 31, 1985

ATTACHMENT "C"

UNITED STATES TAX COURT

WILLIAM B. SCHEIDT AND WANDA C. SCHEIDT, Petitioners, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	)	Docket No. 22537-82 BT – IME-GOLD Judge Nims

DECISION

Pursuant to an order of the Court dated November 28, 1990, and incorporating herein the facts recited in the respondent's computation as the findings of the Court, it is

ORDERED AND DECIDED: That there is a deficiency in income tax due from the petitioner for the taxable year 1978 in the amount of $378,769.90.

(Signed) ARTHUR L. NIMS, III
Judge

Entered: FEB 12 1991

* * *

It is hereby stipulated that the foregoing decision is in accordance with the Order of the Tax Court and the respondent's computation and that the Court may enter this decision, without prejudice to the right of either

party to contest the correctness of the decision entered herein.

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UNITED STATES CONSTITUTION, AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * *

UNITED STATES CONSTITUTION, AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective

numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or

any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

26 U.S.C. § 6212

(a) In general. – If the Secretary determines that there is a deficiency in respect of any tax imposed by subtitles A or B or chapter 41, 42, 43, or 44, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

(b) Address for notice of deficiency. –

(1) Income and gift taxes and certain excise taxes. – In the absence of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by subtitle A, chapter 12, chapter 41, chapter 42, chapter 43, or chapter 44, if mailed to the taxpayer at his last known address, shall be sufficient for purposes of subtitle A, chapter 12, chapter 41, chapter 42, chapter 43, chapter 44, and this chapter even if such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

(2) Joint income tax return. – In the case of a joint income tax return filed by husband and wife, such notice of deficiency may be a single joint notice, except that if the Secretary has been notified by either spouse that separate residences have been established, then, in lieu of the single joint notice, a duplicate original of the joint notice shall be sent by certified mail or registered mail to each spouse at his last known address.

(3) Estate tax. – In the absence of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by chapter 11, if

addressed in the name of the decedent or other person subject to liability and mailed to his last known address, shall be sufficient for purposes of chapter 11 and of this chapter.

(c) Further deficiency letters restricted. –

(1) General rule. – If the Secretary has mailed to the taxpayer a notice of deficiency as provided in subsection (a), and the taxpayer files a petition with the Tax Court within the time prescribed in section 6213(a), the Secretary shall have no right to determine any additional deficiency of income tax for the same taxable year, of gift tax for the same calendar year, of estate tax in respect of the taxable estate of the same decedent, of chapter 41 tax for the same taxable year, of chapter 43 tax for the same taxable year, of chapter 44 tax for the same taxable year, of section 4940 tax for the same taxable year, or of chapter 42 tax (other than under section 4940) with respect to any act (or failure to act) to which such petition relates, except in the case of fraud, and except as provided in section 6214(a) (relating to assertion of greater deficiencies before the Tax Court), in section 6213(b)(1) (relating to mathematical or clerical errors), in section 6851 or 6852 (relating to termination assessments), or in section 6861(c) (relating to the making of jeopardy assessments).

(2) Cross references. –

For assessment as a deficiency notwithstanding the prohibition of further deficiency letters, in the case of –

(A) Deficiency attributable to change of treatment with respect to itemized deductions, see section 63(e)(3).

(B) Deficiency attributable to gain on involuntary conversion, see section 1033(a)(2)(C) and (D).

(C) Deficiency attributable to gain on sale or exchange of principal residence, see section 1034(j).

[(D) Repealed. Pub.L. 94-455. Title XIX, § 1901(b)(37)(C), Oct. 4, 1976, 90 Stat. 1803].

(E) Deficiency attributable to activities not engaged in for profit, see section 183(e)(4).

For provisions allowing determination of tax in title 11 cases, see section 505(a) of title 11 of the United States Code.

(d) Authority to rescind notice of deficiency with taxpayer's consent. – The Secretary may, with the consent of the taxpayer, rescind any notice of deficiency mailed to the taxpayer. Any notice so rescinded shall not be treated as a notice of deficiency for purposes of subsection (c)(1) (relating to further deficiency letters restricted), section 6213(a) (relating to restrictions applicable to deficiencies; petition to Tax Court), and section 6512(a) (relating to limitations in case of petition to Tax Court), and the taxpayer shall have no right to file a petition with the Tax Court based on such notice. Nothing in this subsection shall affect any suspension of the running of any period of limitations during any period during which the rescinded notice was outstanding.

26 U.S.C. § 6213

(a) Time for filing petition and restriction on assessment. – Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6851, 6852 or 6861, no assessment of a deficiency in respect of any tax imposed by subtitle A, or B, chapter 41, 42, 43, or 44 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court, including the Tax Court. The Tax Court shall have no jurisdiction to enjoin any action or proceeding under this subsection unless a timely petition for a redetermination of the deficiency has been filed and then only in respect to the deficiency that is the subject of such petition.

(b) Exceptions to restrictions on assessment. –

(1) Assessments arising out of mathematical or clerical errors. – If the taxpayer is notified that, on account of a mathematical or clerical error appearing on the return, an amount of tax in excess of that shown on the

return is due, and that an assessment of the tax has been or will be made on the basis of what would have been the correct amount of tax but for the mathematical or clerical error, such notice shall not be considered as a notice of deficiency for the purposes of subsection (a) (prohibiting assessment and collection until notice of the deficiency has been mailed), or of section 6212(c)(1) (restricting further deficiency letters), or of section 6512(a) (prohibiting credits or refunds after petition to the Tax Court), and the taxpayer shall have no right to file a petition with the Tax Court based on such notice, nor shall such assessment or collection be prohibited by the provisions of subsection (a) of this section. Each notice under this paragraph shall set forth the error alleged and an explanation thereof.

(2) Abatement of assessment of mathematical or clerical errors. –

(A) Request for abatement. – Notwithstanding section 6404(b), a taxpayer may file with the Secretary within 60 days after notice is sent under paragraph (1) a request for an abatement of any assessment specified in such notice, and upon receipt of such request, the Secretary shall abate the assessment. Any reassessment of the tax with respect to which an abatement is made under this subparagraph shall be subject to the deficiency procedures prescribed by this subchapter.

(B) Stay of collection. – In the case of any assessment referred to in paragraph (1), notwithstanding paragraph (1), no levy or proceeding in court for the collection of

such assessment shall be made, begun, or prosecuted during the period in which such assessment may be abated under this paragraph.

(3) Assessments arising out of tentative carryback or refund adjustments. – If the Secretary determines that the amount applied, credited, or refunded under section 6411 is in excess of the overassessment attributable to the carryback or the amount described in section 1341(b)(1) with respect to which such amount was applied, credited, or refunded, he may assess without regard to the provisions of paragraph (2) the amount of the excess as a deficiency as if it were due to a mathematical or clerical error appearing on the return.

(4) Assessment of amount paid. – Any amount paid as a tax or in respect of a tax may be assessed upon the receipt of such payment notwithstanding the provisions of subsection (a). In any case where such amount is paid after the mailing of a notice of deficiency under section 6212, such payment shall not deprive the Tax Court of jurisdiction over such deficiency determined under section 6211 without regard to such assessment.

(c) Failure to file petition. – If the taxpayer does not file a petition with the Tax Court within the time prescribed in subsection (a), the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the Secretary.

(d) Waiver of restrictions. – The taxpayer shall at any time (whether or not a notice of deficiency has been

issued) have the right, by a signed notice in writing filed with the Secretary, to waive the restrictions provided in subsection (a) on the assessment and collection of the whole or any part of the deficiency.

(e) Suspension of filing period for certain excise taxes. – The running of the time prescribed by subsection (a) for filing a petition in the Tax Court with respect to the taxes imposed by section 4941 (relating to taxes on self-dealing), 4942 (relating to taxes on failure to distribute income), 4943 (relating to taxes on excess business holdings), 4944 (relating to investments which jeopardize charitable purpose), 4945 (relating to taxes on taxable expenditures), 4951 (relating to taxes on self-dealing), or 4952 (relating to taxes on taxable expenditures), 4955 (relating to taxes on political expenditures), 4971 (relating to excise taxes on failure to meet minimum funding standard), 4975 (relating to excise taxes on prohibited transactions) shall be suspended for any period during which the Secretary has extended the time allowed for making correction under section 4963(e).

(f) Coordination with title 11. –

(1) Suspension of running of period for filing petition in title 11 cases. – In any case under title 11 of the United States Code, the running of the time prescribed by subsection (a) for filing a petition in the Tax Court with respect to any deficiency shall be suspended for the period during which the debtor is prohibited by reason of such case from filing a petition in the Tax Court with respect to such deficiency, and for 60 days thereafter.

(2) Certain action not taken into account. – For purposes of the second and third sentences of subsection (a), the filing of a proof of claim or request for payment (or the taking of any other action) in a case under title 11 of the United States Code shall not be treated as action prohibited by such second sentence.

(g) Definitions. – For purposes of this section –

(1) Return. –The term "return" includes any return, statement, schedule, or list, and any amendment or supplement thereto, filed with respect to any tax imposed by subtitle A or B, or chapter 41, 42, 43, or 44.

(2) Mathematical or clerical error. – The term "mathematical or clerical error" means –

(A) an error in addition subtraction, multiplication, or division shown on any return,

(B) an incorrect use of any table provided by the Internal Revenue Service with respect to any return if such incorrect use is apparent from the existence of other information on the return,

(C) an entry on a return of an item which is inconsistent with another entry of the same or another item on such return,

(D) an omission of information which is required to be supplied on the return to substantiate an entry on the return, and

(E) an entry on a return of a deduction or credit in an amount which exceeds a statutory limit imposed by subtitle A or B, or chapter 41, 42, 43 or 44, if such limit is expressed –

(i) as a specified monetary amount, or

(ii) as a percentage, ratio, or fraction,

and if the items entering into the application of such limit appear on such return.

(h) **Cross references. –**

(1) For assessment as if a mathematical error on the return, in the case of erroneous claims for income tax prepayment credits, see section 6201(a)(3).

(2) For assessments without regard to restrictions imposed by this section in the case of –

(A) Recovery of foreign income taxes, see section 905(c).

(B) Recovery of foreign estate tax, see section 2016.

(3) For provisions relating to application of this subchapter in the case of certain partnership items, etc., see section 6230(a).

26 U.S.C. § 6501

(a) General rule. – Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

(b) Time return deemed filed. –

(1) Early return. – For purposes of this section, a return of tax imposed by this title, except tax imposed by chapter 3, 21, or 24, filed before the last day prescribed by law or by regulations promulgated pursuant to law for the filing thereof, shall be considered as filed on such last day.

(2) Return of certain employment taxes and tax imposed by chapter 3. – For purposes of this section, if a return of tax imposed by chapter 3, 21, or 24 for any period ending with or within a calendar year is filed before April 15 of the succeeding calendar year, such return shall be considered filed on April 15 of such calendar year.

(3) Return executed by Secretary. – Notwithstanding the provisions of paragraph (2) of section 6020(b), the execution of a return by the Secretary pursuant to the authority conferred by such section shall not start the running of the

period of limitations on assessment and collection.

(4) Return of excise taxes. – For purposes of this section, the filing of a return for a specified period on which an entry has been made with respect to a tax imposed under a provision of subtitle D (including a return on which an entry has been made showing no liability for such tax for such period) shall constitute the filing of a return of all amounts of such tax which, if properly paid, would be required to be reported on such return for such period.

(c) Exceptions. –

(1) False return. – In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

(2) Willful attempt to evade tax. – In case of a willful attempt in any manner to defeat or evade tax imposed by this title (other than tax imposed by subtitle A or B), the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(3) No return. – In the case of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(4) Extension by agreement. – Where, before the expiration of the time prescribed in this section for the assessment of any tax imposed by this title, except the estate tax provided in chapter 11, both the Secretary and the

taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

(5) Tax resulting from changes in certain income tax or estate tax credits. –

For special rules applicable in cases where the adjustment of certain taxes allowed as a credit against income taxes or estate taxes results in additional tax, see section 905(c) (relating to the foreign tax credit for income tax purposes) and section 2016 (relating to taxes of foreign countries, States, etc., claimed as credit against estate taxes).

(6) Termination of private foundation status. – In the case of a tax on termination of private foundation status under section 507, such tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(7) Special rule for certain amended returns. – Where, within the 60-day period ending on the day on which the time prescribed in this section for the assessment of any tax imposed by subtitle A for any taxable year would otherwise expire, the Secretary receives a written document signed by the taxpayer showing that the taxpayer owes an additional amount of such tax for such taxable year, the period for the assessment of such additional amount shall not expire before the day 60 days after the day on which the Secretary receives such document.

(8) Failure to notify Secretary under section 6038B. – In the case of any tax imposed on any exchange or distribution by reason of subsection (a), (d), or (e) of section 367, the time for assessment of such tax shall not expire before the date which is 3 years after the date on which the Secretary is notified of such exchange of distribution under section 6038B(a).

(9) Gift tax on certain gifts not shown on return. – If any gift of property the value of which is determined under section 2701 or 2702 (or any increase in taxable gifts required under section 2701(d)) is required to be shown on a return of tax imposed by chapter 12 (without regard to section 2503(b)), and is not shown on such return, any tax imposed by chapter 12 on such gift may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time. The preceding sentence shall not apply to any item not shown as a gift on such return if such item is disclosed in such return, or in a statement attached to the return, in a manner adequate to apprise the Secretary of the nature of such item.

(d) Request for prompt assessment. – Except as otherwise provided in subsection (c), (e), or (f), in the case of any tax (other than the tax imposed by chapter 11 of subtitle B, relating to estate taxes) for which return is required in the case of a decedent, or by his estate during the period of administration, or by a corporation, the tax shall be assessed, and any proceeding in court without assessment for the collection of such tax shall be begun, within 18 months after written request therefor (filed after the return is made and filed in such manner and such form as may be prescribed by regulations of the

Secretary) by the executor, administrator, or other fiduciary representing the estate of such decedent, or by the corporation, but not after the expiration of 3 years after the return was filed. This subsection shall not apply in the case of a corporation unless –

(1)(A) such written request notifies the Secretary that the corporation contemplates dissolution at or before the expiration of such 18-month period, (B) the dissolution is in good faith begun before the expiration of such 18-month period, and (C) the dissolution is completed;

(2)(A) such written request notifies the Secretary that a dissolution has in good faith been begun, and (B) the dissolution is completed; or

(3) a dissolution has been completed at the time such written request is made.

(e) Substantial omission of items. – Except as otherwise provided in subsection (c) –

(1) Income taxes. – In the case of any tax imposed by subtitle A –

(A) General rule. – If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed.

For purposes of this subparagraph –

(i) In the case of a trade or business, the term "gross income" means the total of the amounts received or accrued from the sale of goods or services (if such amounts are required to be shown on the return) prior to diminution by the cost of such sales or services; and

(ii) In determining the amount omitted from gross income, there shall not be taken into account any amount which is omitted from gross income stated in the return if such amount is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the Secretary of the nature and amount of such item.

(B) Constructive dividends. – If the taxpayer omits from gross income an amount properly includible therein under section 551(b) (relating to the inclusion in the gross income of United States shareholders of their distributive shares of the undistributed foreign personal holding company income), the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed.

(2) Estate and gift taxes. – In the case of a return of estate tax under chapter 11 or a return

of gift tax under chapter 12, if the taxpayer omits from the gross estate or from the total amount of the gifts made during the period for which the return was filed items includible in such gross estate or such total gifts, as the case may be, as exceed in amount 25 percent of the gross estate stated in the return or the total amount of gifts stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed. In determining the items omitted from the gross estate or the total gifts, there shall not be taken into account any item which is omitted from the gross estate or from the total gifts stated in the return if such item is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the Secretary of the nature and amount of such item.

(3) Excise taxes. – In the case of a return of a tax imposed under a provision of subtitle D, if the return omits an amount of such tax properly includible thereon which exceeds 25 percent of the amount of such tax reported thereon, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return is filed. In determining the amount of tax omitted on a return, there shall not be taken into account any amount of tax imposed by chapter 41, 42, 43, or 44 which is omitted from the return if the transaction giving rise to such tax is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the Secretary of the existence and nature of such item.

(f) Personal holding company tax. – If a corporation which is a personal holding company for any taxable year fails to file with its return under chapter 1 for such year a schedule setting forth –

(1) the items of gross income and adjusted ordinary gross income, described in section 543, received by the corporation during such year, and

(2) the names and addresses of the individuals who owned, within the meaning of section 544 (relating to rules for determining stock ownership), at any time during the last half of such year more than 50 percent in value of the outstanding capital stock of the corporation,

the personal holding company tax for such year may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return for such year was filed.

(g) Certain income tax returns of corporations. –

(1) Trusts or partnerships. – If a taxpayer determines in good faith that it is a trust or partnership and files a return as such under subtitle A, and if such taxpayer is thereafter held to be a corporation for the taxable year for which the return is filed, such return shall be deemed the return of the corporation for purposes of this section.

(2) Exempt organizations. – If a taxpayer determines in good faith that it is an exempt organization and files a return as such under section 6033, and if such taxpayer is thereafter held to be a taxable organization for the taxable year for which the return is filed, such return

shall be deemed the return of the organization for purposes of this section.

(3) **DISC.** – If a corporation determines in good faith that it is a DISC (as defined in section 992(a)) and files a return as such under section 6011(c)(2) and if such corporation is thereafter held to be a corporation which is not a DISC for the taxable year for which the return is filed, such return shall be deemed the return of a corporation which is not a DISC for purposes of this section.

(h) Net operating loss or capital loss carrybacks. – In the case of a deficiency attributable to the application to the taxpayer of a net operating loss carryback or a capital loss carryback (including deficiencies which may be assessed pursuant to the provisions of section 6213(b)(3)), such deficiency may be assessed at any time before the expiration of the period within which a deficiency for the taxable year of the net operating loss or net capital loss which results in such carryback may be assessed.

(i) Foreign tax carrybacks. – In the case of a deficiency attributable to the application to the taxpayer of a carryback under section 904(c) (relating to carryback and carryover of excess foreign taxes) or under section 907(f) (relating to carryback and carryover of disallowed oil and gas extraction taxes), such deficiency may be assessed at any time before the expiration of one year after the expiration of the period within which a deficiency may be assessed for the taxable year of the excess taxes described in section 904(c) or 907(f) which result in such carryback.

(j) Certain credit carrybacks. –

(1) In general. – In the case of a deficiency attributable to the application to the taxpayer of a credit carryback (including deficiencies which may be assessed pursuant to the provisions of section 6213(b)(3)), such deficiency may be assessed at any time before the expiration of the period within which a deficiency for the taxable year of the unused credit which results in such carryback may be assessed, or with respect to any portion of a credit carryback from a taxable year attributable to a net operating loss carryback, capital loss carryback, or other credit carryback from a subsequent taxable year, at any time before the expiration of the period within which a deficiency for such subsequent taxable year may be assessed.

(2) Credit carryback defined. – For purpose of this subsection, the term "credit carryback" has the meaning given such term by section 6511(d)(4)(C).

(k) Tentative carryback adjustment assessment period. – In a case where an amount has been applied, credited, or refunded under section 6411 (relating to tentative carryback and refund adjustments) by reason of a net operating loss carryback, a capital loss carryback, or a credit carryback (as defined in section 6511(d)(4)(C)) to a prior taxable year, the period described in subsection (a) of this section for assessing a deficiency for such prior taxable year shall be extended to include the period described in subsection (h) or (j), whichever is applicable; except that the amount which may be assessed solely by reason of this subsection shall not exceed the amount so applied, credited, or refunded under section 6411,

reduced by any amount which may be assessed solely by reason of subsection (h) or (j), as the case may be.

(*l*) **Special rule for chapter 42 and similar taxes.** –

(1) In general. – For purposes of any tax imposed by section 4912, by chapter 42 (other than section 4940), or by section 4975, the return referred to in this section shall be the return filed by the private foundation, plan, trust, or other organization (as the case may be) for the year in which the act (or failure to act) giving rise to liability for such tax occurred. For purposes of section 4940, such return is the return filed by the private foundation for the taxable year for which the tax is imposed.

(2) Certain contributions to section 501(c)(3) organizations. – In the case of a deficiency of tax of a private foundation making a contribution in the manner provided in section 4942(g)(3) (relating to certain contributions to section 501(c)(3) organizations) attributable to the failure of a section 501(c)(3) organization to make the distribution prescribed by section 4942(g)(3), such deficiency may be assessed at any time before the expiration of one year after the expiration of the period within which a deficiency may be assessed for the taxable year with respect to which the contribution was made.

(3) Certain set-asides described in section 4942(g)(2). – In the case of a deficiency attributable to the failure of an amount set aside by a private foundation for a specific project to be treated as a qualifying distribution under the provisions of section 4942(g)(2)(B)(ii), such deficiency may be assessed at any time before the expiration of 2 years after the expiration of the

period within which a deficiency may be assessed for the taxable year to which the amount set aside relates.

[**(m) Repealed.** Pub.L. 100-418, Title I, § 1941(b)(2)(H), Aug. 23, 1988, 102 Stat. 1323]

(n) Deficiencies attributable to election of certain credits. – The period for assessing a deficiency attributable to any election under section 40(f) or 51(j) (or any revocation thereof) shall not expire before the date 1 year after the date on which the Secretary is notified of such election (or revocation).

(*o*) Cross references. –

(1) For period of limitations for assessment and collection in the case of a joint income return filed after separate returns have been filed, see section 6013(b)(3) and (4).

(2) For extension of period in the case of partnership items (as defined in section 6231(a)(3)), see section 6229.

26 U.S.C. §6503

(a) Issuance of statutory notice of deficiency. –

(1) General Rule. – The running of the period of limitations provided in section 6501 or 6502 (or section 6229, but only with respect to deficiency described in section 6230(a)(2)(A)).[1] on the making of assessments or the collection by levy or a proceeding in court, in respect of any deficiency as defined in section 6211 (relating to income, estate, gift and certain excise taxes), shall (after the mailing of a notice under section 6212(a)) be suspended for the period during which the Secretary is prohibited from making the assessment or from collecting by levy or a proceeding in court (and in any event, if a proceeding in respect of the deficiency is placed on the docket of the Tax Court, until the decision of the Tax Court becomes final), and for 60 days thereafter.

(2) Corporation joining in consolidated income tax return. – If a notice under section 65212(a) in respect of a deficiency in tax imposed by subtitle A for any taxable year is mailed to a corporation, the suspension of the running of the period of limitations provided in paragraph (1) of this subsection shall apply in the case of corporations with which such corporation made a consolidated income tax return for such taxable year.

(b) Assets of Taxpayer in control or custody of court. – The period of limitations on collection after assessment prescribed in section 6502 shall be suspended for the period the assets of the taxpayer are in the control or custody of the court in any proceeding before any

court of the United States or of any State or of the District of Columbia, and for 6 months thereafter.

(c) Taxpayer outside United States. – The running of the period of limitations on collection after assessment prescribed in section 6502 shall be suspended for the period during which the taxpayer is outside the United States if such period of absence is for a continuous period of at least 6 months. If the preceding sentence applies and at the time of the taxpayer's return to the United States the period of limitations on collection after assessment prescribed in section 6502 would expire before the expiration of 6 months from the date of his return, such period shall not expire before the expiration of such 6 months.

(d) Extensions of time for payment of estate tax. – The running of the period of limitations for collection of any tax imposed by chapter 11 shall be suspended for the period of any extension of time for payment granted under the provisions of section 6161(a)(2) or (b)(2) or under the provisions of section 6163 or 6166.

(e) Extensions of time for payment of tax attributable to recoveries of foreign expropriation losses. – The running of the period of limitations for collection of the tax attributable to a recovery of a foreign expropriation loss (within the meaning of section 6167(f)) shall be suspended for the period of any extension of time for payment under subsection (a) or (b) of section 6167.

(f) Wrongful seizure of property of third party. – The running of the period of limitations on collection after assessment prescribed in section 6502 shall be suspended for a period equal to the period from the date property (including money) of a third party is wrongfully

seized or received by the Secretary to the date the Secretary returns property pursuant to section 6343(b) or the date on which a judgment secured pursuant to section 7426 with respect to such property becomes final, and for 30 days thereafter. The running of the period of limitations on collection after assessment shall be suspended under this subsection only with respect to the amount of such assessment equal to the amount of money or the value of specific property returned.

(g) Suspension pending correction. – The running of the period of limitations provided in sections 6501 and 6502 on the making of assessments or the collection by levy or a proceeding in court in respect of any tax imposed by chapter 42 or section 507, 4971, or 4975 shall be suspended for any period described in section 507(g)(2) or during which the Secretary has extended the time for making correction under section 4963(e).

(h) Cases under title 11 of the United States Code. – The running of the period of limitations provided in section 6501 or 6502 on the making of assessments or collection shall, in a case under title 11 of the United States Code, be suspended for the period during which the Secretary is prohibited by reason of such case from making the assessment or from collection and –

(1) for assessment, 60 days thereafter, and

(2) for collection, 6 months thereafter.

(i) Extension of time for payment of undistributed PFIC earnings tax liability. – The running of any period of limitations for collection of any amount of undistributed PFIC earning tax liability (as defined in section

1294(b)) shall be suspended for the period of any extension of time under section 1294 for payment of such amount.

(j) Extension in case of certain summonses. –

(1) In general. – If any designated summons is issued by the Secretary with respect to any return of tax by a corporation, the running of any period of limitations provided in section 6501 on the assessment of such tax shall be suspended –

(A) during any judicial enforcement period –

(i) with respect to such summons, or

(ii) with respect to any other summons

which is issued during the 30-day period which begins on the date on which such designated summons is issued and which relates to the same return as such designated summons, and

(B) if the court in any proceeding referred to in paragraph (3) requires any compliance with a summons referred to in subparagraph (A), during the 120-day period beginning with the 1st day after the close of the suspension under subparagraph (a).

If subparagraph (B) does not apply, such period shall in no event expire before the 60th day after the close of the suspension under subparagraph (A).

(2) Designated summons. – For purposes of this subsection –

(A) In general. – The term "designated summons" means any summons issued for purposes of determining the amount of any tax imposed by this title if –

(i) such summons is issued at least 60 days before the day on which the period prescribed in section 6501 for the assessment of such tax expires (determined with regard to extensions), and

(ii) such summons clearly states that it is a designated summons for purposes of this subsection.

(B) Limitation. – A summons which relates to any return shall not be treated as a designated summons if a prior summons which relates to such return was treated as a designated summons for purposes of this subsection.

(3) Judicial enforcement period. – For purposes of this subsection, the term "judicial enforcement period" means, with respect to any summons, the period –

(A) which begins on the day on which a court proceeding with respect to such summons is brought, and

(B) which ends on the day on which there is a final resolution as to the summoned person's response to such summons.

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[1] So in original. The period probably should not appear here.

26 U.S.C. §7482

(a) Jurisdiction. –

(1) In general. – The United States Courts of Appeals (other than the United States Court of Appeals for the Federal Circuit) shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of Title 28 of the United States Code.

(2) Interlocutory orders. –

(A) In general. – When any judge of the Tax Court includes in an interlocutory order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals may, in its discretion, permit an appeal to be taken from such order, if application is made to it within 10 days after the entry of such order. Neither the application for nor the granting of an appeal under this paragraph shall stay proceedings in the Tax Court, unless a stay is ordered by a judge of the Tax Court or by the United States Court of Appeals which has jurisdiction of the appeal or a judge of that court.

(B) Order treated as tax court decision. – For purposes of subsections (b) and (c), an order described in this paragraph shall be treated as a decision of the Tax Court.

(C) Venue for review of subsequent proceedings. – If a United States Court of Appeals permits an appeal to be taken from an order described in subparagraph (A), except as provided in subsection (b)(2), any subsequent review of the decision of the Tax Court in the proceeding shall be made by such Court of Appeals.

(3) Certain orders entered under section 6213(a). – An order of the Tax Court which is entered under authority of section 6213(a) and which resolves a proceeding to restrain assessment or collection shall be treated as a decision of the Tax Court for purposes of this section and shall be subject to the same review by the United States Court of Appeals as a similar order of a district court.

(b) Venue. –

(1) In general. – Except as otherwise provided in paragraphs (2) and (3), such decisions may be reviewed by the United States court of appeals for the circuit in which is located –

(A) in the case of a petitioner seeking redetermination of tax liability other than a corporation, the legal residence of the petitioner,

(B) in the case of a corporation seeking redetermination of tax liability, the principal place of business or principal office or agency of the corporation, or, if it has not principal place of business or principal office or agency in any judicial circuit, then the office to which was

made the return of the tax in respect of which the liability arises,

(C) in the case of a person seeking a declaratory decision under section 7476, the principal place of business, or principal office or agency of the employer,

(D) in the case of an organization seeking a declaratory decision under section 7428, the principal office or agency of the organization, or

(E) in the case of a petition under section 6226 or 6228(a), the principal place of business of the partnership.

If for any reason no subparagraph of the preceding sentence applies, then such decisions may be reviewed by the Court of Appeals for the District of Columbia. For purposes of this paragraph, the legal residence, principal place of business, or principal office or agency referred to herein shall be determined as of the time the petition seeking redetermination of tax liability was filed with the Tax Court or as of the time the petition seeking a declaratory decision under section 7428 or 7476, or the petition under section 6226 or 6228(a), was filed with the Tax Court.

(2) By agreement. – Notwithstanding the provisions of paragraph (1), such decisions may be reviewed by any United States Court of Appeals which may be designated by the Secretary and the taxpayer by stipulation in writing.

(3) Declaratory judgment actions relating to status of certain governmental obligations. – In the case of any decision of the Tax Court in a proceeding under section

7478, such decision may only be reviewed by the Court of Appeals for the District of Columbia.

(c) Powers. –

(1) To affirm, modify, or reverse. – Upon such review, such courts shall have power to affirm or, if the decision of the Tax Court is not in accordance with law, to modify or to reverse the decision of the Tax Court, with or without remanding the case for a rehearing, as justice may require.

(2) To make rules. – Rules for review of decisions of the Tax Court shall be those prescribed by the Supreme Court under section 2072 of title 28 of the United States Code.

(3) To require additional security. – Nothing in section 7483 shall be construed as relieving the petitioner from making or filing such undertakings as the court may require as a condition of or in connection with the review.

(4) To impose penalties. – The United States Court of Appeals and the Supreme Court shall have the power to require the taxpayer to pay to the United States a penalty in any case where the decision of the Tax Court is affirmed and it appears that the appeal was instituted or maintained primarily for delay or that the taxpayer's position in the appeal is frivolous or groundless.

Domestic Mail Manual, §159.333

.333 Holding Period for Registered, Insured, COD, and Certified Mail. Registered, insured, COD and certified mail will be handled as follows:

a. Undelivered registered, insured, COD, and certified mail is retained for not less than 3 days, nor more than the periods specified in b, c, and d.

b. Registered mail is held up to 60 days if the sender so requests by endorsement on the mail. If the sender names no specific period, the mail will be held 10 days before return. *Exception:* If the postmaster believes he will be able to make delivery if the mail is held longer than 10 days, it may be held up to 60 days if written permission is obtained from the sender.

c. Insured and certified mail is held a maximum of 15 days. It is held a lesser number of days if the sender so specifies.

d. COD mail is held a maximum of 30 days. It is held a lesser number of days if the sender so specifies.

Supreme Court, U.S.
FILED
NOV 16 1992

No. 92-470

In the Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM B. SCHEIDT AND WANDA C. SCHEIDT,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a notice of deficiency mailed to petitioners by the Internal Revenue Service at an incorrect address, but actually received by petitioners in ample time for them to file a timely Tax Court petition, was a valid statutory notice as of the date on which it was mailed.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 967 F.2d 1448. The opinion of the Tax Court (Pet. App. 9-19) is reported at 49 T.C.M. (CCH) 1501. The opinion of the Tax Court on motion for reconsideration (Pet. App. 20-23) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1992. The petition for a writ of certiorari was filed on September 16, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. When the Internal Revenue Service determines that a taxpayer owes additional income tax, the Service must generally issue a "notice of deficiency" before it may assess and collect the increased amount. The notice of deficiency sets forth the amount of, and reasons for, the additional tax due. Under Section 6212 of the Internal Revenue Code, a notice of deficiency mailed by certified or registered mail to the taxpayer "at his last known address" is "sufficient." 26 U.S.C. 6212(b)(1).

One purpose of the deficiency notice is to permit the taxpayer to challenge the Service's determination in the United States Tax Court before paying any additional tax.[1] Thus, 26 U.S.C. 6213(a) provides that a taxpayer may petition the Tax Court for review of an asserted deficiency "[w]ithin 90 days * * * after the notice of deficiency * * * is mailed." During that 90-day period (and, if a timely petition for review is filed, until the conclusion of judicial proceedings), the Service is ordinarily barred from assessing or collecting the additional tax. *Ibid.*[2] Conversely, the normal three-year statute of limitations on assess-

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[1] Alternatively, a taxpayer may pay the additional tax asserted (thus halting the accumulation of statutory interest on the amount ultimately determined to be due) and sue for a refund in the district court or the United States Claims Court. See generally 26 U.S.C. 6532, 7422; 28 U.S.C. 1346(a)(1).

[2] There are exceptional situations involving "termination assessments" and "jeopardy assessments" where the Service is not barred from assessing and collecting taxes pending Tax Court review. See 26 U.S.C. 6213(a), 6851, 6852, 6861. Those exceptions are not involved in this case.

ments is tolled during the period that assessment is barred, and for 60 days thereafter. See 26 U.S.C. 6503(a)(1).

2. On June 9, 1982—six days before expiration of the three-year statute of limitations with respect to petitioners' 1978 tax return—the Service sent to petitioners, by certified mail, a notice of deficiency concerning their 1978 and 1979 federal income taxes. Pet. App. 9. The notice was addressed to Post Office Box 20711, Oklahoma City, Oklahoma. Pet. App. 11. Petitioners had, however, relinquished Box 20711 sometime during 1981, and had instead begun renting Box 20748 in the same post office. Pet. App. 10.[3] In addition, on May 19, 1981, petitioners had executed a power of attorney pertaining to their 1978 and 1979 federal income tax returns, directing the Service to send notices and other written communications with respect to those returns to petitioners at 13108 Green Valley Drive, Oklahoma City. *Ibid.*

On or about June 10, 1982, the Village Branch Post Office received the Service's certified letter addressed to petitioners at Box 20711. The post office left a notice in Box 20711 indicating that a certified letter for petitioners was waiting to be picked up. Usually, the post office leaves three such notices with a patron. If certified mail is still unclaimed on the 15th day after the initial notice, it is generally returned to the sender. Pet. App. 12.[4]

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[3] The forwarding order from Box 20711 to Box 20748 had expired on December 31, 1981, and thus was not in effect when the Commissioner mailed the notice of deficiency. Pet. App. 10.

[4] The post office clerk in charge of handling certified mail testified that she had been on vacation in the early part of

The record in this case does not indicate that the Service's certified letter was returned. Pet. App. 12. Instead, the responsible post office clerk speculated that while sorting the mail to be returned she realized that the letter had the wrong box number on it, and therefore placed a certified mail notice in Box 20748 and allowed several extra days for it to be picked up. Tr. 16-17. What is clear is that on July 6, 1982, petitioner William Scheidt received delivery of the Service's letter containing the deficiency notice for 1978 and 1979. Pet. App. 12.

Petitioners mailed their petition for Tax Court review of the 1978 deficiency on September 4, 1982—less than 90 days after the mailing of the notice of deficiency (and thus within the time prescribed by 26 U.S.C. 6213(a)), and 60 days after petitioners actually received the Service's notice. See Pet. App. 12. Petitioners subsequently filed a motion to dismiss their petition for lack of jurisdiction. They contended, see Pet. App. 9, that assessment of additional 1978 taxes was barred by the statute of limitations because the notice of deficiency was not mailed to their "last known address," and therefore could not be effective to toll the statute of limitations before its actual receipt by petitioners—at which point the statute had already expired. Alternatively, they contended that the notice could not be effective before receipt because the post office's delivery of the Service's letter to petitioners' new address constituted a constructive return and "remailing" of the notice

June, and that it was possible that her work had piled up, preventing her from handling the certified mail as promptly as usual. Pet. App. 12.

after the statute of limitations had expired, or because the notice did not reach petitioners in the "due course" of the mail. *Ibid.*

3. a. The Tax Court denied petitioners' motion to dismiss. Pet. App. 19. The Court found that the Commissioner mailed the notice of deficiency on June 9, 1982, prior to expiration of the statute of limitations, and that the notice was not "remailed" at any time. *Id.* at 13. The court determined that, under the circumstances, the Commissioner had not mailed the deficiency notice to petitioners' "last known address." The court noted, however, that because petitioners actually received the notice in sufficient time to file (and did in fact file) a timely petition, *ibid.*, they were not prejudiced by the improper address or by any delay in receipt. *Id.* at 16-17. The court therefore concluded that the deficiency notice was "effective for all purposes from the time of its mailing." *Id.* at 17.

b. The Tax Court denied petitioners' motion for reconsideration. Pet. App. 20-23. The court reiterated its holding that the notice of deficiency was valid, even though improperly addressed, because petitioners actually received the notice with ample time to petition for pre-payment review. *Id.* at 21. The court also rejected petitioners' additional arguments (i) that it was discriminatory to distinguish this situation from the situation where the Service remails a previously undelivered deficiency notice after expiration of the statute of limitations, and (ii) that the notice was invalid because its receipt was delayed by postal employees' "willful violation" of postal regulations. The court viewed these arguments as

obscuring the real issue, which was "whether the notice of deficiency was valid ab initio." *Id.* at 22.

4. The court of appeals affirmed. Pet. App. 1-8. It agreed with the Tax Court that a notice of deficiency which is actually received by a taxpayer with sufficient time to petition the Tax Court for redetermination of the asserted deficiency is valid as of the date the notice was mailed. *Id.* at 6-7. It accepted the Tax Court's holding—which petitioners did not challenge on appeal—that petitioners were not prejudiced by having only 63 days to file a petition. *Id.* at 7. Thus, the court held "that [petitioners] were adequately notified by the notice of deficiency mailed on June 9, 1982 and that the limitations period was tolled as of that date pursuant to § 6503(a)(1)." *Ibid.*

The court of appeals rejected, Pet. App. 7, petitioners' claim that the notice of deficiency was invalid because it was delayed or irregularly handled by the Post Office, and thus was not received in "the due course of the mail." The court found that such a claim had "no basis in the statutory scheme." *Ibid.* The court also found no support in the record for petitioners' theory that the postal clerk's apparent action in placing the notice of deficiency in the correct post office box (rather than returning it to the Service) somehow constituted a "remailing" by the Service after the expiration of the statute of limitations. *Id.* at 7-8.[5] Finally, the court rejected, *id.* at 8, petitioners' claim that it would violate their right to equal protection to distinguish between taxpayers (such as petitioners) who actually receive a

[5] Petitioners appear to have abandoned this argument in their petition to this Court.

timely but misaddressed notice of deficiency, and taxpayers who do not receive such a notice because it is returned to the Service and not remailed before the statute of limitations expires. The court found that distinction "clearly rational." *Ibid.*

ARGUMENT

1. Section 6212(b)(1) of the Internal Revenue Code, 26 U.S.C. 6212(b)(1), provides a "safe harbor" for the Service when it mails a notice of deficiency: so long as the notice is mailed to the taxpayer's "last known address," it will be "sufficient" to permit subsequent assessment of the asserted deficiency, even if it is never actually received by the taxpayer. See, *e.g.*, *Keado* v. *United States*, 853 F.2d 1209, 1211-1212 & n.9 (5th Cir. 1988); *King* v. *Commissioner*, 857 F.2d 676, 681 (9th Cir. 1988). Because the Tax Court held that in this case the Service did not mail the notice of deficiency to petitioners' "last known address," this safe harbor rule is neither applicable nor relevant here. It does not follow, however, that the notice sent to and received by petitioners was invalid.

As the court of appeals concluded, regardless of the address to which notice is sent, "[t]he statutory scheme for tax assessments contemplates that '[a] notice of deficiency that is *actually received* without delay prejudicial to the taxpayer's ability to petition the Tax Court is sufficient to toll the statute of limitations as of the date of mailing.'" Pet. App. 6 (emphasis added), quoting *Borgman* v. *Commissioner*, 888 F.2d 916, 918 (1st Cir. 1989). Petitioners in this case do not dispute that they received the Service's notice of deficiency without delay prejudicial to their ability to petition the Tax Court. Pet. 19;

Pet. App. 7. Petitioners thus received all that they were entitled to under the statute: adequate notice and the opportunity, of which they availed themselves, to obtain prepayment judicial review of their tax liability.[6]

Petitioners contend, Pet. 19, that a notice of deficiency that is not sent to the taxpayer's "last known address" must be *received* before the statute of limitations on assessment is suspended. This contention is expressly refuted, however, by the terms of 26 U.S.C. 6503(a)(1), which states that the statute of limitations is suspended "after the *mailing* of a notice under section 6212(a)" (emphasis added).[7]

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[6] Petitioners had a full opportunity to litigate the merits of the deficiency determination in the Tax Court, and there is accordingly no merit to their claim (see Pet. 20) that they are "innocent" taxpayers who were denied due process of law. See, *e.g.*, *Phillips* v. *Commissioner*, 283 U.S. 589, 597-599 (1931). Indeed, based on the rulings in this and similar cases, petitioners no longer dispute that if the statute of limitations does not bar assessment, they owe the approximately $1.5 million in taxes and interest at issue here. See *Gray* v. *Commissioner*, 88 T.C. 1306 (1987) (consolidated cases involving same abusive tax shelter in which petitioners invested), aff'd as to particular taxpayers *sub nom. Becker* v. *Commissioner*, 868 F.2d 298 (8th Cir. 1989); *Armstrong* v. *Commissioner*, 869 F.2d 1496 (9th Cir. 1989); *Adkins* v. *Commissioner*, 875 F.2d 137 (7th Cir. 1989); and *Kennedy* v. *Commissioner*, 876 F.2d 1251 (6th Cir. 1989). See also *Saviano* v. *Commissioner*, 765 F.2d 643 (7th Cir. 1985) (same tax shelter).

[7] Indeed, any notice of deficiency mailed near the end of the limitations period will likely be received after the limitations period would have expired absent the mailing, even where the notice was correctly addressed. Thus, despite petitioners' protestations to the contrary (Pet. 19), their receipt of the deficiency notice in this case after the date the limitations

Because timely actual receipt of a misaddressed deficiency notice fully satisfies the purposes of the statutory mailing requirement, the courts of appeals have consistently concluded that a notice so received is valid and effective as of the date of mailing. See *Clodfelter* v. *Commissioner*, 527 F.2d 754, 756-757 (9th Cir. 1975), cert. denied, 425 U.S. 979 (1976); *Borgman* v. *Commissioner*, 888 F.2d at 917; *McKay* v. *Commissioner*, 886 F.2d 1237, 1238-1239 (9th Cir. 1989); *Pugsley* v. *Commissioner*, 749 F.2d 691, 692-693 (11th Cir. 1985). See also *Sorrentino* v. *Ross*, 425 F.2d 213, 215 (5th Cir. 1970); *Berger* v. *Commissioner*, 404 F.2d 668, 673-674 (3d Cir. 1968), cert. denied, 395 U.S. 905 (1969); *Delman* v. *Commissioner*, 384 F.2d 929, 933-934 (3d Cir. 1967). There is no reason for this Court to review that conclusion, or its application by the court of appeals to the facts of this case.

2. The cases cited by petitioners are not to the contrary.[8] In *Tadros* v. *Commissioner*, 763 F.2d 89 (2d Cir. 1985), for example, the sole issue was whether the notice of deficiency, which the taxpayer never received, was mailed to the taxpayer's "last known address" for purposes of the statutory safe harbor rule. The court found that it was, and therefore that

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period would have expired had no deficiency notice been mailed is a common occurrence and of no consequence.

[8] Petitioners err in stating (Pet. 11) that the government "informed the Tenth Circuit" that there was a conflict among the circuit courts. Neither in its brief nor at oral argument did the government indicate to the court of appeals that other courts had reached differing results as to the validity of a deficiency notice actually received by a taxpayer in time to file a timely Tax Court petition.

the 90-day period began to run on the mailing date. 763 F.2d at 91-92. Nothing in the court's opinion speaks to the effect of actual receipt of a misaddressed notice within the time required for filing a timely Tax Court petition, and nothing in the facts of the case suggests that the court confronted that issue even indirectly.[9]

In *Sicker* v. *Commissioner*, 815 F.2d 1400 (11th Cir. 1987), the taxpayer received an incorrectly addressed notice of deficiency between 83 and 87 days after it was mailed, and did not file his Tax Court petition until the 91st day after the mailing. Under those circumstances, the court held that the taxpayer had clearly been prejudiced by having a maximum of only eight days in which to file his petition, and therefore refused to give effect to the notice as of the date of mailing. Despite petitioners' assertion (Pet. 14-15) to the contrary, however, the eight days or less involved in *Sicker* is hardly comparable to the 63 days available to petitioners to prepare and file their Tax Court petition. The *Sicker* court made clear that if the taxpayer there had received the misaddressed notice "with ample time to file a petition for redetermination," 815 F.2d at 1401, the notice would have been "deemed to be effective when mailed." *Ibid.* In the

[9] Had the *Tadros* court concluded that notice had not been mailed to the taxpayer's last known address, the case would have resembled *Wallin* v. *Commissioner*, 744 F.2d 674 (9th Cir. 1984), where the deficiency notice was misaddressed and was *not* received by the taxpayer within 90 days of the original mailing. Under those circumstances, the *Wallin* court concluded that the misaddressed notice was not effective. But those circumstances are not apposite here.

present case, petitioners have never disputed that they had ample time to file a Tax Court petition following their actual receipt of the deficiency notice. See Pet. App. 7; Pet. 19. Indeed, they in fact filed a timely petition. See page 4, *supra*.

The decisions in *Ward* v. *Commissioner*, 907 F.2d 517 (5th Cir. 1990); *Kennedy* v. *United States*, 403 F. Supp. 619 (W.D. Mich. 1975), aff'd mem., 556 F.2d 581 (6th Cir. 1977); *McPartlin* v. *Commissioner*, 653 F.2d 1185 (7th Cir. 1981); and *Crum* v. *Commissioner*, 635 F.2d 895 (D.C. Cir. 1980), upon which petitioners also rely, are similarly inapposite. In each case, the deficiency notice was not mailed to the taxpayer's last known address *and* was not received in time to file a Tax Court petition within 90 days of the original mailing.[10] None of the cases petitioners cite dealt with a clearly non-prejudicial address error of the type involved in this case.[11]

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[10] Petitioners also cite *DiViaio* v. *Commissioner*, 539 F.2d 231 (D.C. Cir. 1976). Pet. 17. In *DiViaio*, the Service sent a notice of deficiency to the warden of a federal prison with the request that he serve the notice on an inmate taxpayer. The court concluded that the Service had chosen to appoint the warden as its agent to make personal service, rather than mailing the notice directly to the taxpayer in accordance with 26 U.S.C. 6212, and therefore held that the statutory notice-on-mailing rule was simply inapplicable. 539 F.2d at 234. *DiViaio*'s unique facts and holding lend no support to petitioners' arguments in this case.

[11] Compare *Commissioner* v. *Stewart*, 186 F.2d 239, 241 (6th Cir. 1951) (same provisions in prior law) (where taxpayer received notice and filed a timely Tax Court petition, any error in addressing notice to taxpayer's attorney was harmless and did not affect validity of notice); *Eisenberg* v. *Commissioner*, 47 T.C.M. (CCH) 729, 730 (1983), aff'd mem., 753 F.2d

Finally, petitioners contend (Pet. 9-10 & nn.1-2, 16) that the decision below conflicts with the Fourth Circuit's decision in *Powell* v. *Commissioner*, 958 F.2d 53 (4th Cir.), cert. denied, No. 92-452 (Nov. 2, 1992). *Powell* held that a notice of deficiency properly addressed to taxpayers at their last known address[12] could be invalidated by alleged postal and administrative mishandling that resulted in the taxpayers' not receiving the notice in time to file a timely Tax Court petition. 958 F.2d at 56. In this case, in contrast, the notice of deficiency was improperly addressed, but was received by petitioners in time for them to file a timely Tax Court petition. In our view, the fact of timely actual receipt *vel non* underlies both the decision below (where the Service could not claim the benefit of the statutory safe harbor for proper mailing) and the decision in *Powell* (where the

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1078 (7th Cir. 1985) (even if notice was improperly mailed or mishandled by post office, it was effective as of the mailing date where taxpayer actually received it within 20 days of mailing and thus had ample opportunity to file a timely Tax Court petition).

[12] Petitioners question, Pet. 10 n.1, our position that the court of appeals' decision in *Powell* did not disturb the Tax Court's finding that the Service mailed its notice of deficiency to the Powells' "last known address." We think it clear that the *Powell* court based its holding on what the court perceived as a failure of due diligence *after* the Service knew or should have known that the notice had failed to reach the taxpayers at the initial address. See 958 F.2d at 56-57. In any event, the important distinction between this case and *Powell* is that the taxpayers in this case actually received notice of the asserted deficiency in a timely manner, regardless of the address to which the notice was mailed.

Fourth Circuit apparently considered it inequitable to apply the statutory safe harbor in the face of alleged postal errors and administrative laxity, and therefore gave effect to the notice only from the time of actual receipt). Because that fact also distinguishes the two cases, we perceive no fundamental conflict between the two decisions that requires the intervention of this Court.[13]

3. Petitioners seize on language used in passing by the court in *Berger* v. *Commissioner*, *supra*, to argue that three courts of appeals have required that an improperly addressed notice be received "in due course" in order to be effective from the date of mailing. See Pet. 12. As developed in the petition, see Pet. 12-15, this argument appears merely to restate the proposition that the courts will not give effect to a misaddressed notice of deficiency if the consequent delay in its receipt actually prejudices the taxpayer's ability to file a timely petition for review in the Tax Court. That proposition is consistent with the government's position and with the cases cited above, and cannot help petitioners in this case in view of the Tax

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[13] We asked this Court to review the decision in *Powell*, see Pet. for Cert. in No. 92-452, and we agree that the Fourth Circuit's conclusion in that case that a postal error resulting in non-delivery of a properly mailed notice can prevent the notice from tolling the limitations period is inconsistent with the Tenth Circuit's reasoning in rejecting petitioners' "due course of the mail" argument. See *id.* at 13-14. It also conflicts with numerous other appellate decisions. See, *e.g.*, *id.* at 10-14 & n.14, and cases there cited. It is important to recognize, however, that although the court below articulated its reasoning on the "due course" issue broadly, the facts of this case are quite distinct from those of *Powell*.

Court's uncontested finding that they were not prejudiced by any delay in receiving the notice. Pet. App. 7, 16-17; see Pet. 19.

Petitioners also appear to suggest a test based on some conception of what might be considered a "normal" time or procedure for postal delivery. See, *e.g.*, Pet. 19-20. As a legal matter, however, the court of appeals correctly observed that there is "no basis in the statutory scheme" for any such test or rule. Pet. App. 7. As a factual matter, moreover, the Tax Court specifically rejected any claim that petitioners did not receive their notice "in due course" even under such a test. Pet. App. 18-19. There is no basis for further review of either of those conclusions.

4. Finally, petitioners argue that they have been deprived of equal protection of the law "by the Tenth Circuit's distinguishing them from taxpayers who received misaddressed notices of deficiency after the time the limitations period for assessment of tax was due to expire, where the notices were mailed twice rather than once." Pet. 22, citing *Reddock* v. *Commissioner*, 72 T.C. 21 (1979), and *Weber* v. *Commissioner*, 46 T.C.M. (CCH) 1568 (1983). But 26 U.S.C. 6503(a), suspending the statute of limitations "after the mailing" of an effective notice of deficiency, itself dictates the differing result. Petitioners' notice was mailed only once, before the expiration of the applicable limitations period, and was received well within the period prescribed for filing a Tax Court petition. In *Reddock* and *Weber*, by contrast, the original deficiency notice mailings were defective, were *never received* by the taxpayers, and were therefore held ineffective to toll the statute of

limitations; the Commissioner remailed the notices after the limitations period had expired. As the court of appeals below concluded, "a clearly rational distinction exists between those taxpayers [who] receive a notice mailed before the three-year period expires and those who do not." Pet. App. 8. Petitioners here actually received the notice to which they were entitled without prejudicial delay, and have not been deprived of any statutory or constitutional right.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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